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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

~~338~~

No. .....

GEORGE F. MOHR and GENEVIEVE B. MOHR,
Petitioners,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

HYMAN G. STEIN,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Attorney for Petitioners.

WALTER WEHRLE,
101 South Meramec,
Clayton, Missouri,
Of Counsel for Petitioners.

JOHN MONTREY,
REXFORD H. CARUTHERS,
818 Olive Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

RICHARD MARX,
900 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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To the Supreme Court of Missouri.

Petitioners, George F. Mohr, Genevieve B. Mohr and Annie Pitti, pray that a writ of certiorari issue to review the judgments of the Supreme Court of Missouri, entered in the above entitled causes on March 8, 1965. Both of the above cases come from the same Court and involve identical or closely related issues; they are presented under one petition under Rule 23.5.

CITATIONS TO OPINIONS BELOW.

A. The opinion of the Supreme Court of Missouri in the case of George F. Mohr, et al. v. State Highway Commission of Missouri (Mohr R. 269-275), printed in Ap-

pendix A hereto, infra, p. 14, is reported in 388 S. W. 2d 862.

The dissenting opinion of one of the judges of said Supreme Court (Mohr R. 276-285) in said case, printed in Appendix B hereto, infra, p. 21, is reported in 388 S. W. 2d 865.

The said Mohr case came to the Supreme Court of Missouri by transfer from the St. Louis Court of Appeals following an opinion and decision by the St. Louis Court of Appeals affirming the judgment recovered by the Petitioners in the Circuit Court of Warren County, Missouri. The opinion of the St. Louis Court of Appeals, printed in Appendix C, hereto, infra, p. 31, is reported in 378 S. W. 2d 254. The judgment of the Circuit Court of Warren County, Missouri, is not reported. It was entered on a jury verdict returned in favor of Petitioners (Mohr R. 256). Said judgment appears in Mohr Record at pages 257-258.

B. The opinion and judgment of the Supreme Court of Missouri in the case of Annie Pitti v. State Highway Commission of Missouri (Pitti R. 228-238), printed in Appendix E, hereto, infra, p. 51, is reported in 388 S. W. 2d 855.

The dissenting opinion of one of the judges of the Supreme Court (R. 239) in said case, printed in Appendix F, hereto, infra, p. 63, is reported in 388 S. W. 2d 861.

The said Pitti case came to the Supreme Court of Missouri en banc by transfer from Division 1 of the said Supreme Court following an appeal from the Circuit Court of St. Louis County, Missouri. The opinion of Division 1 of the said Supreme Court (R. 198-203) is not reported and is printed in Appendix G, hereto, infra, p. 64. The judgment of the Circuit Court of St. Louis

County, Missouri (Pitti R. 191-192), is not reported. It was entered on a jury verdict returned in favor of petitioner (R. 186).

JURISDICTION.

The judgments of the Supreme Court of Missouri in each case were entered on March 8th, 1965. Petitioners' Motions for Rehearing were duly and timely filed in said Supreme Court of Missouri, on March 19, 1965 (Mohr, R. 289-294), by Petitioners Mohr, and on March 23rd, 1965 (Pitti, R. 241), by Petitioner Pitti. Rule 83.16 of the Missouri Rules of Civil Procedure permits and provides for the filing of a Motion for Rehearing within fifteen days after the opinion of the Supreme Court of Missouri, en banc. Said Motions for Rehearing were denied in each case on April 12th, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether abutting property owners' direct access to an existing highway is a property right which in condemnation proceedings brought by a state is compensable under the Fifth Amendment to the Constitution of the United States as embodied in, and made applicable to the states through, the Fourteenth Amendment to the Constitution of the United States.

2. Where abutting property owners have direct access to an existing highway, does a state's termination and destruction of such direct access without compensation to such property owners, violate and contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

Other than Section 1257 (3) of 28 U. S. C., no statute is involved.

The Constitutional provisions which the cases involve are the Fifth and Fourteenth Amendments to the Constitution of the United States.

The said Fifth Amendment provides in pertinent part as follows:

> "* * * nor shall any person * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The said Fourteenth Amendment provides in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

A. This statement of the case in this sub-head A refers to the proceeding in regard to Petitioners Mohr. All record references in this sub-head A are to the record in the Mohr case.

This is condemnation proceedings brought by Respondent in the Circuit Court of Warren County, Missouri, to acquire the right of way for the construction and maintenance of Interstate Route 70 in Warren County, Missouri. The facts, as is noted by the Supreme Court of Missouri in its own opinion, Appendix A, infra, p. 14, are set forth in detail in the opinion of the St. Louis Court of Appeals, 378 S. W. 2d 254, here printed in Appendix C, infra, p. 31.

Petitioners owned a tract of land abutting the south side of existing U. S. Route 40 in Warren County, Missouri. Said tract was improved with a gasoline station. Before condemnation by Respondent, Petitioners had direct access from their property to existing U. S. Route 40 in two places, one at the west end and the other at the east end of their property.

Following condemnation the Respondent reconstructed U. S. Route 40 and designated it Interstate Route 70. This reconstruction was done by constructing a new west bound lane north of the existing pavement of U. S. Route 40, with the old pavement being resurfaced and utilized as an east bound movement and with an outer roadway constructed on both the south and north sides of the two through lanes of both the south and the north sides of the two existing through lanes of U. S. Route 40 (R. 183-184). By such reconstruction Petitioners said direct access to U. S. Route 40 was destroyed because of the construction by Respondent of an outer roadway between the south lane of U. S. Route 40 and the property of the Petitioners. While Petitioners still had access to the outer roadway, they could not go across the outer roadway and enter what was old U. S. Route 40. The outer roadway leads to interchanges created by such reconstruction, at Warrenton and Wright City, Missouri, each being three miles from Petitioners' property. As a result of the said highway reconstruction Petitioners were left with a choice of going three miles east to the interchange at Wright

City or three miles west to the interchange at Warrenton before entering old U. S. Route 40 (now Interstate Route 70).

In the Petition for Condemnation filed by Respondent in the Circuit Court of Warren County, Missouri (R. 49), Respondent alleged inter alia that its chief engineer submitted his recommendation as to detail plans and that access to, from and across that part of the highway which is here involved be fully limited as shown on said plans (R. 50-51); that Respondent had determined and declared that public interest and safety require that direct access and right of access to, from and across said section of the state highway be fully limited as indicated on said plans and that no abutting owner shall have the right of direct access to said highway or its right of way except that access will be permitted to any adjacent outer roadway to which access is not specifically prohibited (R. 51-52); that all the lands and properties which are being condemned "* * * or rights in which are being affected or extinguished, * * * lie in Warren County, Missouri" (R. 52); and that it is necessary for the proper economical construction and maintenance of the state highway that all the lands, properties, "* * * or rights * * *" as indicated on said plans be acquired and that Respondent has ordered and directed its chief counsel to purchase or condemn the same (R. 52).

In Respondent's said Petition for Condemnation the description by Respondent of the lands, property and rights of Petitioners which are to be condemned are set forth in paragraphs numbered 23, 23.10 and 23.11 thereof (R. 81-82) and in said paragraph 23.10 (R. 81) is contained the following: "* * * (all direct access to the thruway of which from abutting property will be prohibited or limited except as herein set out), * * *." In the prayer of its said Condemnation Petition (R. 103) Respondent prayed inter alia that the land, properties "* * * all

rights herein described * * *" be and stand condemned for the uses therein set out.

This action for condemnation was instituted by Respondent in said Circuit Court of Warren County, Missouri, on May 10, 1962 (R. 104). Missouri law and practice make no provision for the filing by a defendant of an answer in a condemnation proceedings. **St. Louis Housing Authority v. Evans** (Mo. Sup.), 285 S. W. 2d 550, at page 553. On June 11, 1962, said Circuit Court made and entered its order (R. 105) whereby it ordered, adjudged and decreed inter alia, that "* * * the lands, property and rights be and stand condemned for the uses and purposes as set out in the petition; * * *" (R. 106) and appointing commissioners (R. 106). Thereafter said commissioners filed their report awarding Petitioners the sum of $15,000 (R. 108-109). Timely Exceptions were filed by Petitioners (R. 110) and by the Respondent (R. 111). Upon a trial of Exceptions the jury returned a verdict in favor of Petitioners in the sum of $7,000 (R. 256). Thereafter, on October 29, 1962, said Circuit Court entered and rendered judgment on said verdict in favor of Petitioners and against Respondent in the sum of $7,000 (R. 257-258). Thereafter, Respondent appealed to the St. Louis Court of Appeals from said judgment (R. 263). On such appeal the St. Louis Court of Appeals rendered and entered its opinion and decision affirming said judgment (R. 8-31). Thereafter the Respondent filed in the Supreme Court of Missouri its Motion to Transfer a Case to the Supreme Court of Missouri from St. Louis Court of Appeals (R. 4-6); and thereafter, on Respondent's said application the case was by order of the Supreme Court of Missouri transferred from the St. Louis Court of Appeals to the Supreme Court of Missouri (R. 44). On March 8, 1965, the Supreme Court of Missouri entered and filed its opinion that the judgment of the Circuit Court of Warren County, Missouri, be reversed

and the cause remanded (R. 269-275). Judge James A. Finch, Jr., one of the judges of the Supreme Court of Missouri, dissented and filed his dissenting opinion (R. 276-285).

In its opinion the Supreme Court of Missouri held that the trial court had erred in admitting evidence of damages based on loss of direct access to the previously existing U. S. Highway lanes and in instructing the jury to consider this in determining compensation to be paid the Petitioners, and further that the Respondent would be entitled to an instruction withdrawing "* * * improper elements of damage * * * *" (R. 269 at pages 274, 275).

On March 8, 1965, the Supreme Court of Missouri entered its judgment in said case that the aforesaid judgment of the Circuit Court of Warren County, Missouri, be reversed and that the cause be remanded to said Circuit Court of Warren County and further proceedings to be had therein in conformity of said opinion of the Supreme Court. Said judgment of the Supreme Court of Missouri appears at R. 267, 268, and is printed in Appendix D hereto, infra, p. 50.

On March 19, 1965, Petitioners duly and timely filed in said case in the Supreme Court of Missouri their Motion for Rehearing (R. 286). Said Motion for Rehearing appears at pages 286-294 of the Record herewith filed. On April 12, 1965, Petitioners' said Motion for Rehearing was by the Supreme Court of Missouri overruled (R. 302). The order of the Supreme Court of Missouri overruling Petitioners' said Motion for Rehearing (caption omitted) is as follows:

> "Now at this day, on consideration of respondent's motion for rehearing of the above-entitled cause, it is ordered by the Court that said motion be, and the same is, hereby overruled" (R. 302).

In the Motion for a Rehearing filed in the Supreme Court of Missouri by Petitioners as above mentioned,

the Petitioners raised the federal questions here sought to be reviewed by stating and alleging the following claims and allegations (R. 289 at page 294):

> "The majority opinion of the Court permits the sovereign state of Missouri to appropriate respondents' private property, without just compensation, in direct violation and contravention of the Fifth Amendment of the Constitution of the United States.
>
> "The opinion of the Court permits the state to appropriate respondents' private property, for public use, without due process of law, in direct violation of and in contravention of the Fourteenth Amendment of the Constitution of the United States."

The federal questions here sought to be reviewed were first raised in the case by Petitioners in their said Motion for a Rehearing filed by them in the Supreme Court of Missouri. It is believed and Petitioners respectfully suggest that until that time there was no need or occasion to raise a federal question. As mentioned hereinabove there is no provision in Missouri law and practice for the filing of an answer by defendant in a condemnation proceeding.* The trial court had permitted Petitioners' witnesses to testify that they took into consideration

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* In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, at 231, 41 L. Ed. 979, at 982-983, there was no statutory provision for the filing of an answer in an eminent domain proceeding and the defendant first claimed a right under the United States Constitution by a motion for a new trial filed in the trial court and also asserted such claims in the assignment of errors in the State Appellate Court. This Court said (166 U. S. at 231, 41 L. Ed., at 983): "It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court." In such case this Court held that, consequently, the motion to dismiss for want of jurisdiction must be overruled and the case examined upon its merits (166 U. S., at page 232, 41 L. Ed., at page 983).

the element of Petitioners' loss of access in arriving at the amount of compensation to be paid the Petitioners (R. 30). Instruction No. 3 requested by the Petitioners in the trial court and which permitted the jury to take into consideration the taking of Petitioners' rights of access to U. S. Highway 40 had been given by the trial court (R. 30 and R. 206). Instruction No. 6 requested by Respondent in the trial court and which would have removed such loss of access from the jury's consideration had been refused by the trial court (R. 31 and R. 208). On Respondent's appeal the St. Louis Court of Appeals had affirmed the judgment recovered by Petitioners in the trial court; and specifically ruled that the trial court did not err in permitting Petitioners' witnesses to testify as above mentioned, in giving said Instruction No. 3 requested by Petitioners, or in refusing to give said Instruction No. 6 requested by Respondent (R. 30-31). The Petitioners' Motion for a Rehearing was overruled by the Supreme Court of Missouri and thereby the Supreme Court of Missouri held adversely to the rights under the Constitution of the United States which were asserted by Petitioners in their Motion for a Rehearing. **Chicago, B. & Q. R. Co. v. Chicago,** 166 U. S. 226, at 231-232, 41 L. Ed. 979, at 983.

B. Having due regard to this Court's Rule 23.1 (c) Petitioners believe it proper and permissible to avoid a lengthy statement of the facts in the Pitti case. Suffice it to say that Pitti involved condemnation proceedings essentially the same as Mohr. All references in this subhead B are to the record in the Pitti case. The petition filed against Pitti had essentially the same elements as in Mohr and in many instances the language is verbatim. Mrs. Pitti owned a motel located on U. S. Highway 67 in St. Louis County, Missouri. She had direct access to the highway through two road ways. By condemnation her direct access to the highway was destroyed and the motel was placed upon "service roads." Mrs. Pitti there-

upon had access to reconstructed Highway 67 only at interchanges some distance north and south of her motel.

After hearing before the Commissioners, they filed their report (R. 17-18), exceptions were filed by Mrs. Pitti (R. 19-20) and by Respondent (R. 19). Upon a trial of the exceptions a jury verdict was returned for $57,500 by respondent, an appeal taken, judgment affirmed in Division 1 of the Missouri Supreme Court, their opinion and judgment reversed in the Supreme Court en banc, all as fully cited in Section B of "**Opinions Below,**" hereinabove.

A motion for rehearing was timely filed by this Petitioner (R. 241-251) and on April 12, 1965, this motion was denied by the Supreme Court of Missouri in an order wherein it was the exact language quoted above in Mohr (R. 260).

In her said Motion for a Rehearing Petitioner Pitti first raised the federal question here sought to be reviewed by stating and alleging in said motion ". . . the ruling by the majority of this Court is violative of the Constitution of the United States, Amendment Fourteen, Section 1, providing in part, . . . nor shall any state deprive any person of life, liberty or property, without due process of law; . . ." By its ruling the majority of this Court has permitted the State of Missouri to take private property of (Petitioner) for public purposes but denies to (Petitioner) any compensation therefor.

REASONS FOR GRANTING WRIT.

1. By its decisions, opinions and judgments in these cases the Supreme Court of Missouri has decided a federal question of substance not heretofore decided by this Court.

Petitioners' direct access to existing U. S. Route 40 and U. S. Route 67, respectively, were property rights,

and as such, were covered by and entitled to the protection and guarantees of the Fifth and Fourteenth Amendments to the Constitution of the United States. **Creasy et al. v. Stevens et al.**, 160 F. Sup. 404, paragraph 6 at page 411, and paragraph 9 at page 412. (Reversed on other grounds **Martin v. Creasy**, 360 U. S. 219, 3 L. Ed. 1186.)

This issue here presented was once before raised in this Court, but not decided. **Martin v. Creasy**, supra. Although in **Martin v. Creasy** this Court reversed on other grounds, Mr. Justice Douglas, in dissenting, stated the issue here raised by these Petitioners as—"whether or not access rights constitute 'property' in the constitutional sense." 360 U. S. 219 at 228, 3 L. Ed. 1186 at 1192.

2. The importance of the issue here presented is not limited to only these Petitioners. With the advent of the federal interstate highway system and the building by the states of tens of thousand of miles of highways, vast segments of the public will be subjected to the taking and elimination of their rights of access to existing highways. Thus it is a matter of great public importance that the questions here presented be decided by this Court.

3. In the separate opinions of the Supreme Court of Missouri in these cases (Mohr, R. 269-275 and Pitti, R. 228-238), said State Court has held that under the police power of the State of Missouri it was permissible in these cases for the Respondent to destroy the Petitioners' direct access to existing U. S. Route 40 and U. S. Route 67, respectively, without compensation therefor. In so holding the Supreme Court of Missouri has decided a federal question substance in a way probably not in accord with applicable decisions of this Court. In **Delaware, Lackawana & Western Railroad Company v. Town of Morristown**, 276 U. S. 182 at 193, 72 L. Ed. 523 at 527, this Court said: "But, assuming that under the circumstances the

creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property."

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HYMAN G. STEIN,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Attorney for Petitioners.

WALTER WEHRLE,
101 South Meramec,
Clayton, Missouri,
Of Counsel for Petitioners.

JOHN MONTREY,
REXFORD H. CARUTHERS,
818 Olive Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

RICHARD MARX,
900 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

APPENDIX A.

State of Missouri ex rel. State Highway Commission of Missouri, Plaintiff-Appellant,

v.

G. A. Brockfeld et al., Exceptions to the Award of George F. Mohr, Genevieve B. Mohr, John G. Speed, Trustee, Alberta E. Denny, Sinclair Refining Company, a corporation, Noah C. Hase, Irene Hase, People's Bank of Hawk Point, a corporation, William Sands and Fern Sands, Defendants-Respondents.

No. 50,883.

Supreme Court of Missouri,
En Banc.

March 8, 1965.

Hyde, Judge.

This case, transferred from the St. Louis Court of Appeals, is a condemnation proceeding for right of way for the construction of Interstate Route 70. The facts are stated in opinion of the Court of Appeals, 378 S. W. 2d 254, to which reference is made for details.

The situation was that respondents Mohrs owned land (1.67 acres) abutting U. S. Highway 40, leased to respondent Sinclair Refining Company. Sinclair built a gasoline service station on it and leased it to respondent Sands. Route 40 had two separate concrete pavements; the north lane 18 feet wide provided two lanes for westbound traffic, the south lane 24 feet wide provided two lanes for eastbound traffic. There were two entrances from the eastbound traffic lanes of Route 40 to respondents' service station, one at the east end and one at the west end of their property. There was also a crossover between the

separate traffic lanes of Route 40 near the western entrance to the service station.

Interstate 70 also is built with east and westbound through traffic lanes, using for its eastbound traffic lane the eastbound traffic lane of Highway 40 but resurfacing it, and constructing a new 24-foot westbound traffic lane on substantially the same location as the old 18 foot of Route 40. However, on each side of these through traffic lanes, an outer roadway, 20 feet wide, is constructed, on which traffic can proceed in both directions. Respondents had access from their property only to the south outer road, which went to interchanges at Warrenton on the west and at Wright City on the east, each about three miles distant. Traffic could only enter the Interstate 70 through traffic lanes at such interchanges and these were the ones nearest to respondents' property. A county road, making a grade crossing of Route 40, east of respondents' property, will cross Interstate 70 on an overpass but there no interchange is provided to go on to Interstate 70 from that road. The outer roadway is on the old right of way of Route 40 except for a small tract consisting of .036 acre at the northeast corner of respondents' land near the county road which was taken for the purpose of constructing part of the outer roadway toward the county road at the overpass.

The Court of Appeals thus stated respondents' contention: "[R]espondents are not claiming damages because they will not have direct access to Interstate 70 when completed. They do not claim they have any such right of access. Nor do they deny that the appellant has the right, in a proper proceedings, to destroy or impair their right of access to existing Highway 40. But they do contend that they had an easement of access to pre-existing U. S. 40 and that it was a property right which could not be taken from them **by condemnation without just compensation.**" This really amounts to a claim that the state

cannot impose traffic regulations on any lanes of existing highways which change direction of travel and places of entry on such lanes, regardless of means of access provided for abutting landowners, without payment of compensation to them for change in the kind of access they had. This claim is unsound.

Decisions of the courts are conflicting on the nature of an abutter's right of access, the nature of the loss suffered, the nature of a frontage road in a limited access highway and the right of an abutter to be compensated for the loss of direct access to main highway traffic lanes. It is said: "The decisions of the courts seem to fall in three major categories:

"(1) That any loss which results from being placed upon a frontage road is not to be compensated in eminent domain, whether land is taken or not.

"(2) That any loss resulting from being placed on a frontage road should be compensated, but the frontage road should be considered in mitigation.

"(3) That any loss resulting from being placed upon a frontage road should be compensated only when accompanied by a taking of land and that the existence of a frontage road should be considered in mitigation." State of New Mexico ex rel. State Highway Comm. v. Danfelser, 72 N. M. 361, 384 P. 2d 241, 244; Stefan Auto Body v. State Highway Commission, 21 Wis. 2d 363, 124 N. W. 2d 319, 322, both of which held there should be no compensation where a frontage road provided access. See also Arkansas State Highway Commission v. Bingham, 231 Ark. 934, 333 S. W. 2d 728; Langley Shopping Center v. State Roads Commission of Maryland, 213 Md. 230, 131 A. 2d 690; Muse v. Mississippi State Highway Commission, 233 Miss. 694, 103 So. 2d 839; State of New Mexico ex rel. State Highway Comm. v. Lavasek, 73 N. M. 33, 385 P. 2d 361; Selig v. State of New York, 10 N. Y. 2d

34, 217 N. Y. S. 2d 33, 176 N. E. 2d 59; Darnall v. State of South Dakota, 79 S. D. 59, 108 N. W. 2d 201; Nelson v. State Highway Board, 110 Vt. 44, 1 A. 2d 689, 118 A. L. R. 915.

As stated in Pennysavers Oil Co. v. State of Texas (Tex. Civ. App.), 334 S. W. 2d 546, 548-549, where freeway lanes were built east of the old highway on which plaintiff's service station was located reducing it to a frontage road: "The State has the right under the provisions of Art. 6674w, supra, and its police power, to provide for one-way traffic, no U turns, division barriers, no left or right turns, traffic lanes, speeding and parking regulations, circuitous routes; for the changing of highways generally, and is not responsible for loss of trade to abutting landowners as a result of the exercise of this police power, so long as it does not amount to a complete taking of the right of access. * * * If the State had decided to build this Freeway a block or a mile from appellant's property, it would likewise have lost its trade, but no abutting property owner has a vested interest in the traffic that passes in front of his property, and if this traffic is diverted by the State building a road at another place, and the traveling public prefer to travel the new road and abandon the old road, the State cannot be held liable for any loss of trade suffered by an abutting landowner on the old abandoned road." See also Holbrook v. State of Texas (Tex. Civ. App.), 355 S. W. 2d 235; State of Texas v. Baker Bros. Nursery (Tex. Sup.), 366 S. W. 2d 212.

Of course, a complete blocking of an abutter's access takes from him a property right in the nature of an easement and this requires resort to eminent domain. However, ingress and egress to a particular lane of a highway and direction of travel thereon can be regulated under the police power of the state for public safety and general welfare, without compensation to an abutter who is fur-

nished unrestricted right of access to a lane of the highway upon which his property abuts and which connects with the restricted lanes at designated points. (See discussion in the following Law Review articles: 13 Mo. Law Review 19 (1948); 3 Stanford Law Review 298, 304 (1951); 27 Washington Law Review 111, 123 (1952); 43 Iowa Law Review 258, 265 (1958); 38 Nebraska Law Review 407, 423 (1959); 11 Baylor Law Review 149 (1959); 56 Northwestern Law Review 587, 603 (1961)). In this case, respondents have been furnished unrestricted access to a lane of the highway, an outer road on its right of way, along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway.

Cases contrary to this conclusion are cited and discussed in the opinion of the Court of Appeals but as the court recognized there has been no previous opinion in accord with them in this state. A more recent case now cited is Hendrickson v. State of Minnesota, 267 Minn. 436, 127 N. W. 2d 165, brought on the theory of "inverse condemnation," in which no land of the plaintiffs was taken and the old highway, a single two-way traffic pavement, was left as it was but designated an outer service lane. Two new traffic lanes were built on the opposite side of the old pavement from plaintiffs' property, one for southbound traffic and one for northbound traffic. The court held plaintiffs had a right to reasonably convenient access to the main thoroughfare and would be entitled to damages for its substantial impairment. An award of damages, in this situation, is contrary to long settled Missouri law as well as respondents' theory of this case, which the Court of Appeals recognized by saying: "If Old 40 Highway had become the outer road, then respondents would not be damaged by loss of access for the reason that their access would not be disturbed." For

a case so holding see State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N. E. 2d 53. Hill-Behan Lumber Co. v. State Highway Commission, 347 Mo. 671, 148 S. W. 2d 499, was an action for consequential damages for impairment of plaintiff's means of ingress and egress by building a viaduct in a public street. Plaintiff's property abutted on the street and no part of it was taken but plaintiff's access to and from the viaduct was by ramps. We held that, in the absence of an authorizing statute, consequential damages could not be recovered from the state and pointed out that such statutes existed only as to cities. (In the Hendrickson case, the court did find legislative intent to compensate owners in the situation therein involved, 127 N. W. 2d l. c. 169, footnote 1.) In the Hill-Behan case, we followed Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. 2d 1168, and the many cases cited therein, which involved a claim for consequential damages for change of grade, no part of plaintiffs' property being taken. See also State ex rel. State Highway Commission v. Lynch, Mo. Sup., 297 S. W. 2d 400. In this case, while a small tract of respondents' land was taken, it was taken to become a part of the outer road where it angled toward the county road overpass and thus furnished access for this corner of respondents' land to this outer roadway.

We can see no difference of legal significance in leaving an old pavement as an outer road and building new pavement for limited access thoroughfares or in building a new outer road pavement and using the old pavement (or new pavement on its location) for the limited access thoroughfares. In either situation the abutting owner would have the same access to his property and the same circuity of travel to reach the throughway lanes on which he desired to travel. The real basis for complaint of an abutting owner, which makes a difference to him if he operates a commercial enterprise, is diversion of traffic. However, it is generally well settled (as shown by the

cases herein cited; see also 18 Am. Jur. 899, Eminent Domain, Sec. 259; 29A C. J. S., Eminent Domain, § 162, p. 702) that such an owner has no right to a continuation of the flow of traffic directly in front of his property (which could be affected just as much by building a new road a block or a mile away as by limiting access to the old road and giving him access by an outer road); and that diminution in the value of land because of such diversion of traffic is the result of an exercise of the police power and is noncompensable. See State ex rel. State Highway Commission v. Meier, 388 S. W. 2d 855, decided concurrently herewith. Therefore, it was error to admit evidence of damages based on loss of direct access to previously existing U: S. Highway 40 lanes and to instruct the jury to consider this in determining compensation to be paid to respondents. Appellant would be entitled to an instruction withdrawing improper elements of damage which should be modeled after 30.02, Missouri Approved Jury Instructions.

The judgment is reversed and the cause remanded.

Eager, C. J., Storckman, Holman and Henley, JJ., and Stone, Special Judge, concur.

Finch, J., dissents in separate dissenting opinion filed.

Dalton, J., not sitting.

APPENDIX B.

Finch, Judge (dissenting).

I find that I am unable to concur with some of the conclusions stated in the majority opinion or with its decision to reverse and remand this case, and I respectfully dissent therefrom for the reasons herein set out.

We start with an agreed premise that under the law of Missouri an abutting property owner on an existing highway has a right of access to that highway which is known as an easement appurtenant. This is recognized as a property right. In State ex rel. State Highway Commission v. James, 356 Mo. 1161, 1168, 205 S. W. 2d 534, 537, this court said: "The fee to land taken for right-of-way remains in the abutting owners, subject to the right of the State to construct and maintain a highway for the public use. In addition to an interest in the fee, abutting owners have an easement of access from their property to the highway. This constitutes a property right, an interest in land." The writers of some Law Review articles have speculated as to the origin of this right and just what its fate should be as compared with the rights of the general public in the establishment of modern limited access highways. We need not concern ourselves therewith, however, because both appellant herein and the majority opinion recognize the existence of this property right.

Secondly, we have an additional premise that if this right of access is extinguished, the abutting property owner is entitled to compensation. Appellant's brief states: "We agree that a property owner abutting upon an existing conventional type highway has a right of access which is a property right. We also agree that if this right is taken, the owner is entitled to any decrease resulting in the value of his property from that taking." The majority opinion states: "Of course, a complete blocking of an abutter's

access takes from him a property right in the nature of an easement and this requires resort to eminent domain."

A third agreed premise is that the State, under its police power, has the right, for reasons of safety, to control traffic by such actions as providing for one-way traffic, prohibiting "U" turns or left turns, erecting divider strips, controlling speed, and like actions.

A fourth agreed premise is that the abutting property owner has no property right in traffic. Thus, if the State should build a new highway at a new location, leaving the existing highway as it was, the abutter has no claim by reason of the fact that traffic has been diverted to the new highway.

The problem then becomes one of applying these agreed principles to the facts and reaching a conclusion as to whether what the State has done has been merely to exercise its right to control traffic under the police power without taking the property owner's right of access, or whether what the State has done takes or destroys the abutting property owner's right of access.

The majority opinion reaches the conclusion that the construction by appellant of the so-called outer roadway on the principal right-of-way (when this term "principal right-of-way" is used herein it means the wide main right-of-way on which the thru-ways are located) in front of the Mohr property preserves their pre-existing right of access. In so holding the majority opinion adopts the position of appellant as expressed in argument before this court that when the abutting property owner is permitted to cross the property line between his property and the highway right-of-way and proceed on a roadway provided thereon, he is accorded his right of access, and everything the State does thereafter to control traffic is an exercise of the police power, for which no compensation

is due. The majority opinion states it in this manner: "In this case, respondents have been furnished unrestricted access to a lane of the highway, an outer road on its right of way; along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway."

In the argument before this court at this session of the case of State ex rel. State Highway Commission v. Meier et al., 388 S. W. 2d 855 (hereinafter referred to as the Meier case), decided simultaneously herewith, the Chief Counsel for the State Highway Commission undertook to delineate the State's position with reference to this question of access of abutting property owners in these limited access highway situations. The Meier case involved substantially the same question as is involved herein. The Chief Counsel explained that when an access road is located on the principal right-of-way, it is known as an "outer roadway." When the access road leaves the principal right-of-way, it immediately loses its designation as an "outer roadway" and becomes a "service road." The latter might be a road constructed or located entirely off the principal right-of-way or it might be a continuation of an "outer roadway" which leaves the principal right-of-way. This is true even though it leaves the principal right-of-way only a few feet. The State's policy, as enunciated in the argument of the Meier case, is that an abutter who has an "outer roadway" in front of his property can cross onto the principal right-of-way and has lost no access, but an abutter who is served by a "service road" (and has no "outer roadway" in front of his place) has suffered a complete loss of access and is entitled to just compensation.

The Chief Counsel gave an illustration of a "service road" in which the State acquired an easement which

joined but was not a part of the principal right-of-way. On it the State constructed a "service road" which ran parallel to the principal right-of-way to a point of intersection with a county road which in turn crossed the limited access road via an overpass. There was no interchange at that point and the owner would have had to follow a more circuitous route but concededly would reach an interchange eventually. The Chief Counsel stated that this was a "service road," not an "outer roadway," and an abutter would be entitled to compensation. Obviously, the same would be true even if an interchange were added at that overpass, because the test of the State is whether the owner has an "outer roadway" or a "service road."

Application of these principles illustrates, in my judgment, the fallacy in the position of appellant and the majority opinion in holding that there is no loss of access where there is an "outer roadway" in front of the property of the particular abutting property owner. For example, assume in this particular case that the State Highway Commission, instead of building an "outer roadway" on the right-of-way in front of Mohr, had constructed a "service road" which ran parallel to the thruway but which ran along the back side of Mohr's filling station. The Mohr property thus would be located between the right-of-way on which the thruways were constructed and the "service road." Assume further that said "service road" was built exactly parallel to the thruways and went to Wright City on the east and Warrenton on the west, at which places it would be possible to enter or leave the thruways via the interchanges constructed at those two points. Under this assumed set of facts, the Mohrs would travel identically the same distance to get to either Warrenton or Wright City, and would travel identically the same distance to enter the thruway at either Warrenton or Wright City. The only difference would be that the access road would not be

on the principal right-of-way. However, in view of the fact that the Mohrs in this hypothetical situation, would not be able to actually enter an access road on the main right-of-way in front of their premises, they would be held, under the position of appellant, to have suffered a complete loss of access for which they would be entitled to compensation. The construction and existence of the "service road" would simply be in mitigation of their damages which they would have suffered if their property had been landlocked, with no access road provided. Under the circumstances, to conclude that the Mohrs, when served by the "service road" running south of their property and separated a few feet from the main right-of-way, in the hypothetical situation, are entitled to compensation on the basis of loss of access, whereas the Mohrs, when served by the "outer roadway" on the main right-of-way, have suffered no loss of access, is to find a distinction where there is no real difference. The fallacy in this position can be dramatized ever more under the following hypothetical set of facts: Suppose that the appellant built on the main right-of-way an "outer roadway" in front of the Mohrs, and then shortly after leaving the boundary of the Mohr property, the "outer roadway" leaves the main right-of-way, and thereafter via a "service road" goes to Wright City to the east and to Warrenton on the west. This might be a "service road" which went fairly directly or by a more circuitous route. In either event, the application of the philosophy of appellant and the conclusions of the majority opinion would mean that the Mohrs have suffered no loss of access since they are served in front of their property by an "outer roadway." At the same time, an abutting property owner adjacent to Mohr but served by the "service road" as it leaves the main right-of-way would be recognized to have had his right of access destroyed, for which he would be entitled to compensation. In this instance, the property owners cannot, as the Chief Counsel expressed it, "step

access" from their property onto the principal right-of-way. Instead, they must go onto the "service road" and thence to the interchange. This means, according to the position of the State Highway Commission, that this property owner has lost his right of access even though he travels identically the same access road as the Mohrs.

The fact that appellant recognizes that the moment the access road leaves the principal right-of-way, it becomes a "service road" and no longer is considered by them a part of the highway, illustrates the true nature of this access road. In some instances such road might leave the main right-of-way at points and then return again, and this might be repeated at other points. Surely, under such circumstances, the same identical access road cannot be a part of the main highway (an integral part of one facility, as the appellant's brief expresses it) in some instances and not in others, dependent merely on whether at that point it happens to lie within or without limits of the principal right-of-way. This illustration serves to put the access road in its true light, and to demonstrate that it is not in fact a lane of the main highway. Both of the property owners in our assumed situation are on a pre-existing highway. Both are prevented from entering the thruway in front of their place of business. Access to the highway has been eliminated for both property owners. The State has provided an access road whereby they can reach the highway at an interchange. Each must travel the same access road to reach the same interchange. The sole and only difference is that in one place the access road runs on the principal right-of-way and in other places it does not, and it is denominated an "outer roadway" or a "service road," depending on the place where it is located. The owner on the "outer roadway," according to the State and the majority opinion, has suffered no loss of access and is entitled to no compensation. The one on the "service road," according to the State and

as a necessary corollary of the majority opinion, has had a complete loss of access, for which he would be entitled to compensation. I am of the opinion that this distinction is completely untenable. It seems to me that it erroneously assumes the fact that the access roadway is another lane of the main highway merely because it is located on the principal right-of-way.

Admittedly, it is difficult to draw a clear line of distinction between what is exercise of the police power and what should be acquisition by eminent domain, and what is loss of access and what is loss of traffic only. Loss of access necessarily involves loss of traffic, but loss of traffic need not necessarily involve loss of access. The fact that there is loss of traffic does not mean the owner has no loss of a property right, if there is also a loss of access. It might be helpful to note what is said in 43 Iowa Law Review, pages 258, 264, where it is stated: "It is recognized, however, that while traffic regulations are held to come under the police power, they are directed to people already using the highway and only indirectly affect the abutting owner's right of access. The controlled-access facilities statute, on the other hand, is directed solely against the right of abutting owners to unlimited access to the highways."

This difficulty of handling the question of access rights of abutting property owners is illustrated by the variation in policy of state highway departments in dealing therewith. An article in 56 Northwestern University Law Review, page 587, entitled "Frontage Roads: To Compensate or Not to Compensate," states on pages 600 and 601 that a survey indicated that twenty-two states compensate a landowner who formerly abutted the main highway when placed on a frontage road. It shows further that twenty-one states (including Missouri) do not compensate the landowner under those circumstances. There were varying positions in other states.

An examination of the condemnation petition herein sheds some light on whether the State actually was condemning a right of access in this case. Paragraph 3 of that petition recites that the Chief Engineer of appellant has recommended to the Commission that access to, from and across part of the highway be fully limited as shown on the plans, and that a copy of the plans for the part of the highway involved in this condemnation proceeding is filed in the Clerk's office and made a part of the condemnation petition by reference. Paragraph 5 of the petition states as follows: "Relator has, in compliance with law, found, determined and declared that public interest and safety require that direct access and right of access to, from and across said section of state highway be fully limited as indicated on said plans, that no abutting owner shall have the right of direct access to said highway or its right-of-way except that access will be permitted to any adjacent outer-roadway to which access is not specifically prohibited by the special symbol denoting 'No Right of Access' as shown on said plans." Paragraph 6 recites that the lands being condemned "or rights in which are being affected or extinguished, and which are described herein" lie in Warren County. Paragraph 7 recites that the Commission has been unable to agree with the owners on compensation "of the lands, property and rights herein described." Paragraph 8 then says that for the construction of the highway it is necessary to acquire the lands, properties "or rights" and that the Commission has so determined and directed the Chief Counsel to purchase or condemn same. Thereafter various paragraphs describe the interests of various defendants, and Paragraph 23 refers to the property in this condemnation suit and it contains the language, "all direct access to the thruway of which from abutting property will be prohibited or limited except as herein set out." Thereafter in Paragraph 34 in the prayer of the petition, the Commission asks that

the "land, properties or rights herein described" be condemned.

I would assume that everyone would agree that a condemnation proceeding is not involved in or necessary to an exercise of the police power. If, for example, the Highway Department decides to erect a median strip down the middle of the highway, it goes ahead and does it. In this instance, however, these various allegations in the condemnation petition establish the fact that the limitation or extinguishment of the rights of access was by condemnation.[1] This could be done only on the basis of payment of whatever is just compensation for the lands, properties or rights thereby acquired.

I do not deem it necessary to review or discuss all of the various cases cited in the majority opinion herein or in the majority opinion in the Meier case. The applicable legal principles really are not in dispute. The differences arise in a consideration of the facts and the application of the legal principles thereto. I am not convinced that the result of the conclusions herein expressed is to overrule earlier Missouri cases or to reach a conclusion necessarily inconsistent therewith. It is possible to reason by analogy therefrom, as the majority opinions herein and in the Meier case have done, but I do not find any case which rules the question of whether an "outer roadway" is sufficient to prevent the abutting owner from suffering a loss of his right of access. The case of State ex rel. State Highway Commission v. Vorhof-Duenke Company, Mo., 366 S. W. 2d 329 involved a situation where an existing highway was being converted to a limited access highway, and the opinion says the landowner was to be served by

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[1] In State ex rel. State Highway Commissioner v. Vorhof-Duenke Company, Mo., 366 S. W. 2d 329, 335, wherein the petition contained similar language, this court said: "Where, as here, the condemnation of existing rights of access are involved, the ascertainment of special benefits to the landowners' damages becomes even more complicated."

"a service road, or outer roadway." Language in the opinion at least implies a recognition of a change in access and the opinion holds that it was inappropriate in an instruction on special benefits to refer to the owner's property as located "directly on an improved highway," but the appeal was by the landowner and did not involve specifically the question with which we are concerned.

In my judgment, an analysis of the nature of the access road as hereinbefore set out illustrates that the abutting property owner has suffered a loss of access. If the result I would reach is inconsistent with the rulings in any of the previous Missouri cases, then to that extent, and to that extent only, I would overrule or modify those cases.

I would affirm the judgment.

APPENDIX C.

In the St. Louis Court of Appeals,
April Session, 1964.

State of Missouri, ex rel. State Highway Commission of Missouri,
(Plaintiff) Appellant,

vs.

G. A. Brockfeld et al., Exceptions to the Award of George F. Mohr, Genevieve B. Mohr, John G. Speed, Trustee, Alberta E. Denny, Sinclair Refining Company, a Corporation, Noah C. Hase, Irene Hase, People's Bank of Hawk Point, a Corporation, William Sands and Fern Sands,
(Defendants) Respondents.

No. 31,531.

Appeal from the Circuit Court,
Warren County.

Hon. George P. Adams, Judge.

Opinion Filed April 21, 1964.

The respondents, George F. Mohr and Genevieve Mohr, filed a motion in this court to dismiss the appeal of the appellant for its failure to comply with Supreme Court Rule 83.05 requiring that "the points relied on shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong" in the rulings. The motion was submitted with the appeal. After reviewing the record, the court is of the opinion that there is

sufficient compliance with the Rule to require, in the interest of justice, the retention of the appeal. Respondents' motion to dismiss the appeal is, therefore, overruled.

This is condemnation proceedings brought by the State of Missouri at the relation of the State Highway Commission of Missouri to acquire the right of way for the construction and maintenance of Interstate Route 70 in Warren County, Missouri. The action was instituted on May 10, 1962. Thereafter, commissioners were duly appointed and on June 21, 1962, they filed their report awarding the respondents the sum of $15,000.00. Timely exceptions were filed by appellant and respondents George F. Mohr and Genevieve B. Mohr and upon a trial of the exceptions, the jury on October 30, 1962, returned its verdict in favor of respondents in the sum of $7000.00, and from the judgment entered thereon the appellant appeals.

The respondents Mohr owned a tract of land abutting the south side of existing Route 40 in Warren County, Missouri, about half way between Warrenton and Wright City. The tract had a frontage along Route 40 of approximately 313 feet, a depth along its east line of approximately 284 feet, and along its west line of approximately 200 feet with a width across the back of 300 feet. The tract of land was improved with a gasoline service station leased from Respondents Mohr by the Respondent Sinclair Refining Company, a corporation, and by it leased to Respondents Sands. There were two (2) commercial type entrances from the property to Route 40, one at the east end and one at the west end of said property.

At this location Route 40 as it then existed was a dual lane highway with two concrete pavements. It ran in a generally east and west direction. The north lane was 18 feet in width and carried two lanes of traffic westwardly. The south lane, upon which the Mohr property abutted, was 24 feet in width and carried two lanes of

traffic eastwardly. Approximately opposite the western entrance from said property to Route 40 was a cross-over connecting the two pavements of Route 40 so that traffic on the west-bound lane could turn onto the east-bound lane by using the crossover, and vice versa. There is a county road running north and south located approximately 271 feet east of Respondents' Mohr east property line.

In constructing Interstate 70 Highway, the appellant is appropriating a small tract of land, consisting of 0.05 acre. There are no improvements located on this small tract. The reconstruction of Interstate 70 will involve the construction of a new west-bound lane and resurfacing of the east-bound lane and the construction of two outer roadways, one being located on each side of the through lanes of Interstate 70. Both outer roadways will carry traffic in both directions while the north Interstate 70 pavement will carry traffic only in a western direction and the south Interstate 70 pavement will carry traffic only in an easterly direction. Both outer roadways will lead to interchanges at Warrenton and Wright City, Missouri, each being about three (3) miles from property in question. The respondents have free access to the south outer roadway which leads to Warrenton and Wright City, Missouri. At each interchange traffic on outer roadways can enter onto Interstate 70 and traffic from that highway can enter onto the outer roadways. The county road east of the Mohr property will be carried up and over Interstate 70 and there will be no interchange at the point where the county road crosses Interstate 70.

Before the improvements described herein, Respondents Mohr had direct access from their property to existing Route 40 in two (2) places, one at the west end and the other at the east end of their property. By the new construction, this direct access to Route 40 is destroyed because of the construction of the outer roadway between

the south lane of Route 40 and the property of Respondents Mohr. While Respondents Mohr had access to the outer roadway, they could not go across the outer roadway and enter what was old Route 40. But said respondents could, by traveling the outer roadway, finally have access to old Route 40. The sole question presented here is whether Respondents Mohr had a property right in the easement of direct egress and ingress on pre-existing Route 40 which, when taken in condemnation, entitles them to compensatory damages. The trial court ruled that such loss of access to existing Route 40 was an element of damage to be considered by the jury in assessing said respondents' damages. Did the trial court err in so ruling? The answer to that question will rule the various assignments of error made by the appellant.

The appellant assigns as error the refusal to give its offered Instruction No. 6, which reads as follows:

> "The Court instructs the jury that if you find from the evidence in this case that after the appropriation of a part of defendants' property and the reconstruction of Route 70, the defendants will have an unlimited right of access to an outer roadway of Route 70, then you shall not award to the defendants, nor allow them any amount of money because of the fact that there is no direct access between defendants' remaining property and the through ways of Route 70."

It also assigns as error the giving of Respondents' Mohr Instruction No. 3, which reads as follows:

> "The Court instructs the jury that in determining just compensation to be paid to the defendants for the appropriation of their property by the plaintiff, as described in the evidence, you may take into consideration the damages, if any, resulting to the remainder of defendants' whole tract of land by reason

of the taking of defendants' rights of access to U. S. Highway 40, existing on June 21, 1962, and by the construction of the limited access highway as described in evidence."

There was evidence in the record to support the giving of Instruction No. 3, above, because witnesses for Respondents Mohr testified that the loss of access to existing Route 40 caused by the new construction was an element of damage considered by each of them in fixing said respondents' damages. Appellant objected to this line of testimony, sometimes belatedly, all of which were overruled, and made motions to strike, sometimes untimely, all of which were overruled. Whether the trial court erred in admitting such testimony will be determined by the answer to the main question involved herein.

Here we are concerned with two classes of highways, the "limited access highway" and the "land service road." The "limited access highway" is of comparatively recent origin in Missouri, being first authorized in our 1945 Constitution, Article IV, Section 29. Like its name signifies, there is no direct access to the throughway except at certain well spaced entrances and exits connecting outer roadways and intersecting highways. The usual direct access is allowed between the outer roadways and abutting property but no abutting owner shall have the right of direct access to said highway or its right of way. Directly means in a direct manner and without anything intervening. The very term, limited-access highway, conveys the idea that ingress and egress to the main traveled portion of the throughway has been circumscribed and restricted. Even if an outer roadway and ramp are close at hand, their course and place of entrance may be roundabout and burdensome to abutting property owner. As in the case at bar, the respondent had a choice of going three miles east to the interchange at Wright City or three

miles west to the interchange at Warrenton before entering old 40.

The previously existing U. S. 40 was a "land service road," which is the term used to describe the ordinary highway which is intended primarily to enable abutting landowners to have access to the outside world as distinguished from the "limited access road," which is a "traffic-service road" designed primarily to move through traffic. 43 ALR (2) 1074. In the instant case, U. S. 40 had been used as a "land service road" for many years and the respondents had an easement of access, that is egress and ingress, from their service station property to said highway for many years. In the construction of Interstate 70, a "limited access highway," the appellants sought to appropriate a portion of respondents' real estate and to cut off and extinguish respondents' right of easement to U. S. 40. As we understand the record, respondents are not claiming damages because they will not have direct access to Interstate 70 when completed. They do not claim they have any such right of access. Nor do they deny that the appellant has the right, in a proper proceedings, to destroy or impair their right of access to existing Highway 40. But they do contend that they had an easement of access to pre-existing U. S. 40 and that it was a property right which could not be taken from them **by condemnation without just compensation.**

The abutting owners of land have an easement of access, that is, egress and ingress, from their property to the existing highway, which constitutes a property right, an interest in land, which cannot be taken by condemnation without compensation.

State ex rel. State Highway Commission v. James, 356 Mo. 1161, 205 S. W. (2) 534;

Christy v. Chicago B. & Q. Railroad Company, 240 Mo. App. 632, 212 S. W. (2) 476;

Filger v. State Highway Commission, Mo. App., 355 S. W. (2) 425, 431;

State ex rel. State Highway Commission v. Vorhof-Duenke Co., Mo., 366 S. W. (2) 329, 335;

State ex rel. State Highway Commission v. Green, Mo., 305 S. W. (2) 688, 691;

Smith v. State Highway Commission, 346 P. (2) 250 (Kans.);

McMoran v. State, 345 P. (2) 598 (Wash.);

Mueller v. New Jersey Highway Authority, 158 A. (2) 343 (N. J.);

State ex rel. Ashworth v. State Road Commission, 128 S. E. (2) 471 (W. Va.);

Mississippi State Highway v. Finch, 114 So. (2) 673 (Miss.);

State by and through State Highway Commission v. Burke, 265 P. (2) 783 (Oregon);

In re Appropriation of Easement for Highway Purposes, 112 N. E. (2) 411 (Ohio);

43 A. L. R. (2) 1072, 1074; A. L. R. (2) Supp. 1962, p. 952.

That the above statement of law is supported by the great weight of authority is recognized by our Supreme Court in State v. Vorhof-Duenke Company, supra, where Judge Storckman, speaking for the court, says, l. c. 335:

> "Limiting access to public highways is of comparatively recent origin. The power to do so first appeared in our 1945 Constitution. 'Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street' is the subject of an annotation in 43 A. L. R. 2d 1072, and this statement supported by the great weight of authority appears at page 1074, § 3: 'Where an established "land service road," in which the normal right of access had already come into being, is converted into a limited-access way in such a manner that the

existing rights of access are destroyed, the owners of such rights are entitled to compensation, exactly as they would be if such rights were destroyed by any other type of construction'. For later cases on the subject of this annotation, see A. L. R. 2d Supplement Service, 1960 Issue, p. 2954, supplementing the annotations in A. L. R. 2d Volumes 20-68; and A. L. R. 2d Supplement Service 1962 Issue, p. 952, covering A. L. R. 2d Volumes 1-80. In accord is the Missouri case of State ex rel. State Highway Commission v. James, 356 Mo. 1161, 205 S. W. 2d 534, 537 [7, 8]. In addition to Mr. Wilkie Cunnyingham's dissertation, supra, there are articles in 27 Washington Law Review, p. 111, and 3 Stanford Law Review, p. 298, on the subject of limiting access to and egress from public highways."

But appellant contends that abutter's right of access on pre-existing highway does not include the right to have the highway forever maintained past his property in the manner in which it was originally constructed and cites some Missouri cases. An examination of these cases discloses that the factual situation is different from that in the instant case. In Filger v. State Highway Commission, Mo. App., 355 S. W. (2) 425 (K. C. App.), the Highway Commission constructed **islands on its own right of way** which diminished abutting owner's direct access from 163 feet to 47½ feet which did not materially block entrance or exit and the court held abutting owner was not entitled to damages. In Hill-Behan Lumber Company v. State Highway Commission, 347 Mo. 671, 148 S. W. (2) 499, the Commission **changed the grade** within confines of the right of way to inconvenience of abutting owner and the court held, absence statute, no damages were authorized. In Handlan-Buck Company v. State Highway Commission, Mo., 315 S. W. (2) 219, it was held that where **owner's property was not located adjacent to**

street which was being converted into limited-access highway; owners had no easement of access. In Christy v. Chicago B. and Q. Railroad Company, 240 Mo. App. 632, 212 S. W. (2) 476, the plaintiff's **land did not abut** upon that part of street involved. In none of the above or other cases cited by appellant was land **actually taken** from abutting owners' tract by condemnation and his right of access also destroyed. We do not consider above cases controlling here. The respondents herein do not deny that appellant has the right to change the highway from its original construction. They simply contend that when appellant, in changing the highway by condemnation, appropriates some of their land and destroys and impairs their right of access on existing U. S. Highway 40, that they are entitled to compensation therefor.

Appellant also contends that, even though respondents had an easement of access from and to their property on existing old 40 Highway and such access was destroyed by construction of Interstate 70, respondents cannot recover damages herein **for loss of access** because of the construction of an **outer road**, to which they have access, which will lead them to the interstate system. The outer road referred to gives respondents a choice of going east three miles to Wright City interchange, or going west three miles to Warrenton interchange. But regardless of where the outer road leads, it does not change the fact that prior to the new construction the respondents had an easement of access, which was a property right, to then existing old 40 Highway. This right of access was destroyed before the construction of the outer road. That right is gone forever. The construction of the outer road did not restore the property right of access to Old 40 Highway. It did provide another way to get onto the highway system. But certainly no one would seriously contend that the service station property of respondents, with easement of access to then existing 40 Highway, was

not damaged by destruction of that easement simply because of the construction of an outer road which connects said property with the general highway system. What was once a valuable commercial site, due partly to the existing easement, has lost its value as commercial property and may now have value only as residential or farm property. The kind and extent of access or lack of it is always considered by a man of ordinary prudence in deciding whether or not he will purchase residential, commercial, or rural real estate. The construction of the outer road may well be taken into consideration by the triers of the fact in **mitigation of damages** and as to the extent that respondents are damaged but it is **not a defense** to the destruction of respondents' easement of access to Old 40 Highway. If Old 40 Highway had become the outer road, then respondents would not be damaged by loss of access for the reason that their access would not be disturbed. But such is not the case here.

In State of Arizona ex rel. Robert Morrison, Atty. General v. Thelberg, 350 P. (2) 988 (Ariz.), a condemnation proceedings was brought to condemn defendant's land for a controlled-access highway. A **frontage road** was constructed parallel to the controlled-access highway which afforded access thereto a distance of 1400 feet from defendant's property. In discussing the measure of damages, the court says, l. c. 992:

> "[4] When the controlled-access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor. The damages may be merely nominal or they may be severe. Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount which would be just under the circumstances. Knox County v. Lemarr,

20 Tenn. App. 258, 97 S. W. 2d 659. Other means of access may mitigate damages, State v. Ward, 41 Wash. 2d 794, 252 P. 2d 279, but does not constitute a defense to the action however. Golden v. Louisville & N. R. Co., 228 Ky. 134, 14 S. W. 2d 379."

In State v. Ward et ux., 252 P. (2) 279 (Wash.), there was a condemnation proceeding in which the question arose as to whether the plans showing a service road were admissible. The court says, l. c. 280:

"[1] Not only is some of appellants' land taken, but their right of access to the highway from the remaining land is also being condemned. Lack of access, of course, has a bearing upon the extent of the damage done to the remainder of the land, as well as upon the diminution of special benefits which ordinarily accrue to abutting land from the right to use the highway. The limited access feature of the highway must, therefore, be presented to the jury together with all other features of the proposed construction such as service roads, to enable it to properly assess all the elements of damage and special benefit that will result therefrom.

* * * * * * *

"[2] There is no such question of substitution in the instant case. This is readily apparent when we realize that access to the land on the west side of the highway was not over any highway or road. Indeed, the road which served the entire farm did not lead from the buildings to the land in question. Nor is it contended by the state that the service road will give access between the two parcels of appellants' property. It is, therefore, not a substitute for severance damages. Without the service road, however, the land in question would be landlocked and practically valueless. Thus, the service road avoids the damage which a lack of access would cause. This is mitigation, not substitution.

"The amount of damage which the entire project will do to appellants' land on the west side of the highway depends upon whether or not there will be a service road. The plan for it was therefore admissible in evidence for the guidance of the jury."

In People v. Ricciardi, et al., 144 P. (2) 799, the purpose of the condemnation was to acquire land for an underpass. Service roads furnished property owners only a circuitous means of access to highway. The court held that whether owners possessed a right which had been damaged was for the trial court, but how much the service road would mitigate the damage was for the jury, saying, l. c. 806:

"* * * This evidence was before the court at the close of defendants' case at which time the ruling was made permitting the expert witnesses to testify to the effect upon the market value of the property not taken by reason of the contemplated improvement and the consequent requirement that the owner must thereafter take another route to reach the through traffic lane which before the improvement was immediately in front of his premises. To sustain the plaintiff's position would require a ruling by this court to the effect that although a landowner's easement of access has been substantially impaired, under no circumstances should circuity of travel occasioned thereby enter into a computation of the damages to be awarded. Such a ruling obviously would be beyond the bounds of propriety. Certainly the plaintiff would not contend that if the underpass be constructed as proposed and no means of access to Rosemead Boulevard be provided for, the defendants would be without redress. It is too plain to admit of argument that if the underpass be constructed as proposed and the service roads were not provided for in the contemplated improvement, the defendants' right of access to Rose-

mead Boulevard would be practically destroyed. **In providing for the service roads the state must be deemed to have proceeded in frank recognition of the private right of access possessed by the defendants, that such right would be invaded, and intended by means of those service roads to minimize and entirely absorb the damages to which the defendants would otherwise be entitled.** (Emphasis ours.) But in any event the question whether the defendants possessed a right which was damaged was for the trial court to determine. As to how much the service roads would mitigate the damage, i. e., how much would be the net damage, was a question of fact for the jury. See Knox County v. LeMarr, 20 Tenn. App. 258, 97 S. W. 2d 659, 661."

In Grand River Dam Authority v. Misenhiemer, et al., 161 P. (2) 757, the court says, l. c. 758:

"The controversy in this case arises out of the closing of U. S. Highway No. 60 at two points, one a little less than a quarter of a mile to the west of plaintiffs' property and the other about a quarter of a mile to the east and a little south of said property, by inundation caused by the closing of the dam belonging to defendant. The said highway runs along the south side of plaintiffs' property. **The principal question for determination is whether in a case of this kind the owner of property abutting on the highway has a cause of action for damages against the Grand River Dam Authority when another roadway has been opened by the county which ordinarily affords a means of ingress and egress".** (Emphasis ours.)

At l. c. 761, the court further says:

"[3-5] An owner must show that some right or interest which he enjoys in connection with the prop-

erty, which is not shared with or enjoyed by the public, is affected to entitle him to damages. The test is, has he suffered a special injury different in kind from that suffered by the public in general? The owner of property has a special interest in the roadway or street upon which his property abuts different from the general public. He has the right to adequate access to his land on the highway from either direction and whenever that right is cut off or materially impaired by an obstruction in the highway he suffers an injury different in kind, not merely in degree, from that suffered by the public in general. If the highway upon which his property is placed in a pocket or cul-de-sac, he suffers a special injury and may recover damages even though he has access thereto by a more inconvenient circuitous route. We think this expresses the better view as well as the rule to which we are committed in this jurisdiction."

In Oklahoma Turnpike Authority v. Chandler, 316 P. (2d) 828, the Supreme Court of Oklahoma approved the doctrine announced in Misenhimer case, supra, saying, l. c. 832:

"In view of our consistent adherence to the rule we are not constrained to re-evaluate such pronouncement upon the basis, suggested by defendant, that compensation for damages for diminution in value must be considered by weighing relative interests of the public and the individual, to the end that government will not be unduly burdened in the exercise of what may be determined as most compatible for the public welfare.

"Defendant also urges, as part of the first proposition, that it was prejudiced by the court's refusal to instruct the jury that any judgment for plaintiffs had to be based upon a determination that any dam-

age suffered was special and peculiar to plaintiffs, and different from that suffered by the general public, **and thereby precluded the jury from considering whether plaintiffs still had a convenient means of egress and ingress identical with that used by the community** in general. (Emphasis ours.)

"The jury was instructed that if the evidence showed construction of the Turnpike placed plaintiffs' property on a dead end road, materially impaired their right to use the road as it formerly existed and thereby caused them damage, their verdict should be for plaintiffs. Such instruction conformed to the rule announced in the Misenhimer and Terminal Oil Mill cases, supra. **Moreover, the jury was instructed that it might consider whether plaintiffs had been provided with a better or worse outlet than they had before the road was closed.**" (Emphasis ours.)

In Clayton County v. Billups Eastern Petroleum Company, 123 S. E. 2d 187, the court says, l. c. 189:

"The sole question here is whether a cause of action is stated for damage to property by a petition alleging facts sufficient to authorize a jury to find substantial impairment of an owner's right of ingress and egress directly to and from the highway where, as in this case, the highway is converted from an unlimited to a limited access road **and there is provided at the time of the change a service road by which the plaintiff's property can be reached.** Is such damage to be held to be compensable as a damaging of private property within the meaning of the constitutional provision in Art. I, Sec. III, Par. I (Code Ann., § 2-301), providing in part that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid?" (Emphasis ours.)

The court further says, l. c. 190:

"**The defendant contends that the easement of access theory is not realistic as applied to a four-lane express highway, as modern expressways are designed and constructed to move traffic in volume and are not planned, designed, constructed, or maintained to furnish business to establishments contiguous to them. This argument, however, is totally inapplicable under the facts as alleged in the present petition where the plaintiff had enjoyed practically unlimited ingress and egress for almost seven years before the highway was changed from an unlimited to a limited access one.** Obviously, a different question would have been presented had the plaintiff located his business adjacent to an existing limited access road. **Here, a right the plaintiff had enjoyed for almost seven years was allegedly substantially damaged.** Neither our case law nor the constitutional provision makes any distinction as to the class of road involved. The prohibition is against the taking or damaging of private property for public purposes without just compensation.

"**Other jurisdictions have allowed compensation for impairment of the right of access even though there is available a means of indirect access, whether from other existing streets or by construction of service or feeder roads.** See 43 A. L. R. 2d 1077 (4)." (Emphasis ours.)

In Nichols et al. v. Commonwealth, 121 N. E. 2d 56, the Supreme Court of Massachusetts says, l. c. 57:

"Before the taking the petitioners were the owners of a parcel of land which comprised approximately 6 acres with a frontage of approximately 410 feet on the turnpike to which the petitioners had unlimited direct access. The land taken comprised about .37 of an acre on the front of this parcel bordering on

the turnpike. Before the taking the entire parcel was used for residential purposes but it was zoned so that use for commercial purposes was permitted for a depth of 200 feet from the turnpike.

"There was evidence that the petitioners had indirect access to the new highway by way of Preston Street, which bounded that part of the land which remained after the taking, but such indirect access was by a difficult route" (Emphasis ours).

The court held that in proceeding upon petition for damages allegedly sustained in taking petitioners' land for highway purposes, evidence which bore upon impairment of and injury to petitioners' former access to public way was erroneously excluded even though there was evidence that petitioners had indirect access to the new highway.

We do not find that the precise question of the effect of the building of an outer roadway has upon the right of an abutting landowner to collect compensation, when a portion of his land abutting an existing highway is condemned and his direct access to said highway has been impaired, has ever been decided by the courts of this state. The appellant cites some cases from foreign jurisdictions to the effect that the building of an outer roadway under such circumstance is a defense to the destruction or impairment of abutting owners direct access, but no Missouri cases. We are of the opinion, however, that the sounder rule is that the building of the outer roadway as aforesaid only goes to the mitigation of damages which such abutting owner may suffer as so decided in cases cited above. Regardless of the rule elsewhere, in Missouri it is the law that the abutting owner's right of access to an existing highway is a property right which, when taken by condemnation along with a parcel of land, entitles him to just compensation. The appellant ordinarily builds an outer roadway so that the abutting own-

er's property will not be **landlocked** and thereby to reduce said owner's damages due to the destruction of his direct access, and the jury may consider such fact, among others, in determining the amount of compensation due said owner. The existence of the outer roadway, therefore, is to be considered only in mitigation of damages unless, perchance, the benefits of the outer roadway equal the damages resulting from loss of access, in which event the jury might conclude the landowner suffered no damage from loss of access. But the extent the building of an outer roadway reduces the abutting landowner's damages from loss of direct access is a jury question and it cannot be said that the building of an outer roadway is, as a matter of law, a complete defense as contended by appellant.

The measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the difference between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof. The damages awarded abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in value of the remaining property before and after access thereto has been destroyed or impaired. This in turn is based upon the highest and best use to which the land involved is best suited before and after the right of access is molested. (State v. Thelberg, 350 P. (2) 988, 992.) Loss of the easement of access, and the construction of an outer roadway, therefore, are elements which the jury may consider in determining the abutting landowner's compensation in a condemnation suit.

The court is of the opinion that:

1. The trial court did not err in permitting respondents' witnesses to testify that they took into considera-

tion the element of loss of access in arriving at the amount of compensation to be paid the respondents.

2. The trial court did not err in giving Instruction No. 3 for respondents which permitted the jury to consider the taking of respondents' right of access to existing U. S. Highway 40 in determining the damages, if any, resulting to the remainder of respondents' whole tract of land. The instruction properly declares the law and is supported by the evidence.

3. The court did not err in refusing to give Instruction No. 6 on behalf of appellant. This instruction does not properly declare the law and is not supported by the evidence. Respondents did not in the trial court claim that they had any right of access to the through way of Route 70. Nor claim damages from the lack of it. They claimed damages for destruction of their right of access to existing old Highway 40 as affecting their land. The instruction also told the jury that if respondents had unlimited access to an outer roadway, then they should not allow respondents any amount of money. In other words, this instruction told the jury that access to the outer roadway was, as a matter of law, a defense to respondents' loss of access. This is not the law. Appellant should have submitted to jury that the unlimited right of access to the outer roadway was an element to be considered in mitigation of respondents' damages because of loss of access to old Highway 40.

We do not find any error in the trial of this case and judgment herein is affirmed.

Frank W. Hayes,
Frank W. Hayes,
Special Judge.

E. M. Ruddy, Presiding Judge, concurs.

John J. Wolfe, Judge, concurs.

APPENDIX D.

Judgment.

In the Supreme Court of Missouri En Banc.

And thereafter the following proceedings were had and entered of record in said cause on the 8th day of March, 1965, to-wit:

State ex rel. State Highway Commission of Missouri, Appellant,

50 883 vs.

G. A. Brockfeld et al., On Exceptions to Award of George F. Mohr et al., Respondents.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Warren County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of Warren County for further proceedings to be had therein in conformity with the opinion of this court herein delivered, and that the appellant recover against the said respondents costs and charges herein expended, and have execution therefor. (Opinion filed.) Transcript—$154.00; Docket Fee—$10.00; Total Costs—$164.00.

APPENDIX E.

State of Missouri ex rel. State Highway Commission of Missouri,
Plaintiff-Appellant,

v.

Regina Meier et al., Exceptions of Annie Pitti, Defendant-Respondent.

No. 50290.

Supreme Court of Missouri,
En Banc.

March 8, 1965.

Per Curiam.

The following opinion, written as a dissenting opinion in Division Number One by Dalton, J., is, with some deletions and additions, adopted as the opinion of the Court en Banc.

Respondent had judgment for $57,500.00 which was more than $30,000.00 in excess of the highest damages conceded by appellant so that jurisdiction is in this court.

Respondent accepted the statement of facts as set forth in appellant's brief, hence we take the facts from that statement. Respondent owned 1.0718 acres of land fronting 293 feet more or less on the west side of Highway 67 by an average depth of 150 feet on which she operated a motel. By condemnation appellant acquired for highway right-of-way purposes a tract of land approximately 30 feet wide along the entire frontage of this property, containing .222 acres, and also a temporary construction easement containing approximately .097 acres. After the condemnation, the right-of-way for the highway was 300

feet wide in front of respondent's property. The right-of-way has been improved with two "limited access" 2-lane throughways in the center portion of the right-of-way and two paved outer roadways on the outer edges of the right-of-way. Each of the outer roads are dual-lane trafficways so that traffic may move in either direction to designated entrances into the throughways. Prior to the improvement respondent had two driveways from her property on to Highway 67, which was then a 2-lane highway, and travelers could enter her property therefrom and on leaving respondent's property they could proceed in either direction. Appellant, however, did not condemn nor take from respondent the right of ingress or egress from her remaining property to the 2-lane highway constructed upon the portion of the 300-foot highway right-of-way adjacent to her property and respondent, her customers and invitees may enter upon that 2-lane outer roadway from any point along the entire frontage of respondent's remaining property and she or they may proceed in either direction north or south as before the condemnation took place and they may enter the throughways at the designated places. Travelers may come to her property over the same routes. There is no limitation of access insofar as respondent's remaining property is concerned, but respondent and her invitees will **not** be able to enter upon the "limited access" 2-lane throughways in the center of the 300-foot highway unless they go, **as all other members of the traveling public must go,** to the proper entrances which are available some distance north and south of respondent's motel.

An abutting owner's property right to "access" is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further right to connect with or reach the system of public highways, which right is also subject to reasonable restrictions under the police power of

the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State. Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are "damnum absque injuria", or damage without legal injury. The trial court, therefore, erred in admitting evidence of depreciation of the value of respondent's property by reason of the diversion of traffic and the so-called "loss of access".

While the petition in this case and the plans for the improvement may show that no abutting property owners shall have the right of direct access to the throughways, except as shown on the plans, this prohibition applies with equal force to all members of the general traveling public and the statement is a declaration under the police power of the State as granted to the State Highway Commission by the Constitution of Missouri, 1945, Art. IV, Sec. 29, V. A. M. S. Damages caused thereby are damages without legal injury and are not recoverable. Therefore, as far as respondent and her property rights are concerned she has the same right of ingress and egress from her remaining property to the highway right-of-way that

existed before, but after she or her invitees enter upon the adjacent right-of-way of the highway, they are subject to the same regulations, inconveniences and controls that govern all other members of the traveling public. They must go to the established entrances to get on the throughways. The "limited access" in this case is, therefore, only the limitation of access as applied to the throughways. That limitation is imposed by the State Highway Commission under the police power of the State and that regulation applies to respondent and her invitees just like it does to everyone else using the highway. If it causes damage and inconvenience, it is a common inconvenience applicable to all.

Respondent, as an abutting property owner on a public highway, does not now have and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or small, on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor has she had a property right to have the same amount of traffic pass her property as before or to have it move in the same direction. Respondent's property right of access has never extended further than the right to enter upon the highway or to leave it and have reasonable connection to the public road system. Once upon the highway, the police power of the State controlled and respondent and her invitees were subject to the "Rules of the Road" as established by statute under the police power of the State (Ch. 304, Traffic Regulations, R. S. Mo. 1959, V. A. M. S.) and now, as may be determined by the State Highway Commission under constitutional authority. No one has a right to drive on any part of the road he may want to or the way he wants to. These Rules of the Road and all such police power regulations apply to respondent and

her invitees in common with all other members of the public and she may not collect damages for common inconveniences that she may suffer along with all other members of the public, nor for damages resulting from the exercise of the police power of the State.

While this Court may not have previously ruled a case exactly like this one, nevertheless, we think the general issues have been settled by many appellate court decisions, the most recent of which we find to be Filger v. State Highway Commission, decided by the Kansas City Court of Appeals, February 5, 1962, and reported in 355 S. W. 2d 425. This opinion is in conformity to the law of this State as previously declared, and it further represents sound public policy, as previously recognized. In that case the owners of a tract of land abutting upon the highway had sued for damages allegedly suffered through alterations of the traffic pattern on the existing highway. The Court of Appeals, in an opinion by Maughmer, C., held that a diminution from 163 feet to 47½ feet in the direct access of the abutting property to the main highway did not materially block or render physically impossible vehicular entrances and did not entitle the owner to an award of damages against the State Highway Commission, and it further held that traffic, great or small, is merely an incident to streets and highways and cannot be considered an element of damages or benefits. The opinion, while not citing many Missouri cases, cites numerous cases from other states which conform to the general law of Missouri and are not inconsistent with the law as previously declared by this Court.

A late decision by the Supreme Court of Arkansas in Arkansas State Highway Commission v. Bingham, 231 Ark. 943, 333 S. W. 2d 728, is also in accord with such decisions of this Court as are available in Missouri at this time. The decision accords with sound public policy and many decisions support the conclusion there reached,

to-wit, that, although the right of ingress and egress is a property right which is compensable in a condemnation action, yet, where the condemnee's remaining land was on an access road, there was no taking of such property right, even though the adjacent access road's nearest connection with the "limited access highway" was more than a mile from condemnee's filling station. It was further held that depreciation in property values and loss occasioned by the diversion of traffic and inconvenience resulting from circuity of travel in reaching the subject property were not compensable; and that evidence of loss resulting from such diversion of traffic, et cetera, was incompetent and inadmissible. One Judge dissented, but we think his views do not accord with prior decisions of this State.

In numerous condemnation cases it has been well established that a condemnee may not recover for such injuries, damages and inconveniences as are common to other members of the public, including other landowners in the neighborhood, portions of whose land has not been taken. Chicago, Great Western R. Co. v. Kemper, 256 Mo. 279, 166 S. W. 291, 295 [8, 9].

In the case of State ex rel. State Highway Commission v. McMurtrey, Mo. Sup., 300 S. W. 2d 521, 527 [6, 7], this Court reversed the case because the trial court had refused to give Instruction No. 3, as follows: "'The Court instructs you that in determining whether there is any damage to the defendant's (sic) land you shall not take into consideration such inconveniences and disadvantages, if any, to the defendant as are the consequences of the lawful and proper use of the state highway in question in so far as the same are common to other landowners in the neighborhood, no portion of whose lands is taken for said state highway. Nor shall you consider any inconveniences, disadvantages, or damages which do not cause a decrease in the market value of the defendant's (sic) land.'"

Also see Missouri, A. & G. R. Co. v. Harris, Mo. Sup., 181 S. W. 34, 35 [3] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Watkins, Mo. App., 51 S. W. 2d 543, 544 [1-3] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Graham, Mo. App., 74 S. W. 2d 493, 494 [2] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Manzer, 229 Mo. App. 287, 77 S. W. 2d 123 [1]; Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480, 485; State ex rel. State Highway Commission v. Hoffman, Mo. App., 132 S. W. 2d 27, 30 [3].

A condemnee may only recover for such items of damages as are special to him.

Further, many cases deal with the rights of an abutting owner upon a public street or highway and point out that such right constitutes a property right and is an interest in land which cannot be taken by condemnation without payment therefor. Nevertheless, the cases point out that this right is subject to certain well-recognized limitations and exclusions. One of these limitations is that the right of ingress and egress does not extend to every foot of the condemnee's frontage, but under the police power of the State the right may be limited to a reasonable access under the existing facts and circumstances. Filger v. State Highway Commission, supra. Every citizen holds his property subject to the valid exercise of the police power. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 13 S. W. 2d 628, 634 [1], and cases cited.

In the case of Christy v. Chicago, B. & Q. R. Co., 240 Mo. App. 632, 212 S. W. 2d 476, 479 [4, 5], the Court said that, "* * * when access to property is cut off in one direction by the vacation or closing of a street upon which it abuts but may be had in the other direction, the property is not taken or damaged. It does not suffer

damage different in kind from that suffered by the general public although injury to the property may be greater."

Other cases hold that an abutting property owner's right of ingress and egress to and from a public street is subject to the city's right to regulate the right in the public interest and that a city may do so as long as such regulations do not unreasonably impair the owner's right. City of Clayton v. Nemours, 353 Mo. 61, 182 S. W. 2d 57, 60 [4-6]; Nemours v. City of Clayton, 237 Mo. App. 497, 175 S. W. 2d 60, 65 [1, 2]; Wilhoit v. City of Springfield, 237 Mo. App. 775, 171 S. W. 2d 95, 98 [4-6].

In the case of Press v. Penny, 242 Mo. 98, 145 S. W. 458, 459 [1, 2], the Court said with reference to the property right of access: "It is true that the exercise of this right is, like the exercise of the right of the public to travel on the same highways, subject to the reasonable control of the Legislature, applied either directly or through its municipal agencies; but each of these rights is subject to those modifications and restrictions necessary to the exercise of the other."

In the case of Gorman v. Chicago, B. & Q. R. Co. & City of St. Louis, 255 Mo. 483, 491, 164 S. W. 509, 511, where the city had authorized the railroad to construct an embankment 15 feet high across a street requiring the rerouting of traffic and an abutting owner of property on the street complained, this Court said: "The right protected by the Constitution because it pertains to his property is the right of access to the street or free passage between his property and the street so that he may go upon it **to exercise his public right of travel,** and when he has done so return to his own ground. * * * **While some courts in other jurisdictions have held that the private right of access to the street appurtenant to abutting property includes the right to travel along the street to certain other places within limits that thus far have not been satisfac-**

torily designated this court has consistently adhered to the doctrine that the right of access is **the only right appurtenant to private property which is not included within such broad control as has been conferred upon the City of St. Louis** by the charter provision we have quoted." (Emphasis ours.)

In the same case the Court further stated: (255 Mo. 483, 494, 164 S. W. 509, 512) "'The inconvenience to every person traveling in a vehicle south of the railroad tracks, who desires to go north directly across them on this public street, and to every person north who desires to go directly on it south across them, of having to make a **detour** by some adjacent street where crossings are provided, is the injury of which the plaintiff complains in each case. **This is a common public injury for which damages cannot be recovered by an individual citizen, although such inconvenience to the public and to him may depreciate the value of his property.**'" (Emphasis ours.) And see Siemers v. St. Louis Elec. Terminal R. Co., 348 Mo. 682, 155 S. W. 2d 130, 136 [9-11].

In the case of Christy v. Chicago, B. & Q. R. Co., supra, 212 S. W. 2d 476, 479 [4, 5], the Court further said: "it is now a well settled doctrine in this state that property is not damaged by the vacation or closing of a street or highway unless it abuts upon that part of the street vacated, **or, is cut off altogether from the general system of streets or highways. This is not a universal doctrine and it has been criticized but it is the law in this state established by a long line of authorities,** which authorities also establish the further proposition that when access to property is cut off in one direction by the vacation or closing of a street upon which it abuts but may be had in the other direction, the property is not taken or damaged. It does not suffer damage different in kind from that suffered by the general public although injury to the property may be greater." (Emphasis ours.)

It will be noted that both the Christy case and Gorman case call attention to the fact that the law of Missouri is not universally accepted in this country; some states do not follow the Missouri law. However, the opinion in Hill-Behan Lumber Co. v. State Highway Commission, 347 Mo. 671, 148 S. W. 2d 499, 502, points out that some contrary decision in other states are based upon statutes or constitutional provisions that are not controlling in Missouri.

A party may recover only when his private property rights are taken, **but not for rights he enjoys as a member of the public.** In Rude v. City of St. Louis, 93 Mo. 408, 414, 6 S. W. 257, 258, the Court said: "In Dill, Mun. Corp., we find this statement: 'Although the distinction between the nature of the rights of the public in a street, and the right of an individual proprietor **to access to his premises** from the street, has been often overlooked, yet it is one which has been asserted by high authority. The right of an abutting owner to access to and from the street is a **private right,** in the sense that it is something different from the right which the members of the public have to use the street for public purposes. Conformably to this doctrine, and in part based upon it, a person owning or in possession of premises abutting on the public highway or street, **whose right of access to the same is unreasonably or unlawfully obstructed,** may recover from the person causing such obstruction damages for the private injury he sustains, where such damages are particular, direct, and substantial.' Section 730, 3 Ed. So the law is quite well settled that the property owner must show, to entitle him to recover damages for an obstruction to a highway, that the damages are peculiar to him, different in kind, and not merely in degree, from those suffered by other members of the community."

In Fairchild v. City of St. Louis, 97 Mo. 85, 87, 11 S. W. 60, the Court said: "The ground of complaint is the same

in each case, and in each case access to the public street to and from the owner's property and along it to the whole public street system of the city is unobstructed, though not so convenient, perhaps, as before this crossing was closed. The inconvenience to every person traveling in a vehicle south of the railroad tracks, who desires to go north directly across them on this public street, and to every person north who desires to go directly on it south across them, of having to make a **detour** by some adjacent street where crossings are provided, is the injury of which the plaintiff complains in each case. This is a common public injury, for which damages cannot be recovered by an individual citizen, although such inconvenience to the public and to him may depreciate the value of his property."

In Wilson v. Kansas City, Mo. Sup., 162 S. W. 2d 802, 803 [1, 2], the Court, with reference to an abutting landowner's rights, said: "'The right protected by the Constitution because it pertains to his property is the right of access to the street or free passage between his property and the street, **so that he may go upon it to exercise his public right of travel,** and when he has done so return to his own grounds.'" (Emphasis ours.)

We hold the trial court erred in refusing to give plaintiff's Instruction A, which was proper under our instruction practice in effect at that time; and in admitting in evidence the testimony concerning the alleged $25,000 decrease in value of the premises due to the diversion of traffic by the limited access nature of the new roadway causing traffic to flow faster by the premises, deterring northbound traffic, hindering southbound traffic and causing an obstacle or barrier interfering with the free flow of customer traffic into the condemnee's property; and that the speed at which the traffic would flow by would deter people who were potential customers from stopping. On retrial, plaintiff would be entitled to an instruction

withdrawing improper elements of damage which should be modeled after 30.02, Missouri Approved Jury Instructions.

The judgment is reversed and the cause remanded.

Eager, C. J., Storckman, Hyde, Holman and Henley, JJ., and Stone, Special Judge, concur.

Finch, J., dissents in separate opinion filed.

Dalton, J., not sitting.

Judgment.

And thereafter the following proceedings were had and entered of record in this cause on the 8th day of March, 1965, to-wit:

State ex rel. State Highway Commission of Missouri,
Appellant,

50 290 vs.

Regina Meier et al., On Exceptions of Annie Pitti,
Respondent.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of St. Louis County for further proceedings to be had therein, in conformity with the opinion of this court herein delivered; and that the said appellant recover against the said respondent costs and charges herein expended, and have execution therefor. (Opinion filed.) Transcript—$144.75; Docket Fee—$10.00; Total Costs—$154.75.

APPENDIX F.

Finch, Judge (dissenting).

This appeal involves the question of whether the conversion of U. S. Route 67 to a limited access highway caused Respondent Anna Pitti to lose her pre-existing right of access to U. S. Route 67 or whether the construction of an outer roadway preserved her right of access and prevented consideration of loss of access in determining her damages. I find myself unable to concur in the majority opinion for the reasons expressed in my dissenting opinion filed in the case of State ex rel. State Highway Commission v. Brockfeld et al., Mo., 388 S. W. 2d 862, decided simultaneously with this case.

I would affirm the judgment.

APPENDIX G.

In the Supreme Court of Missouri
Division Number One
April Session, 1964.

State of Missouri, ex rel. State Highway Commission of Missouri,
Plaintiff-Appellant,
vs.
Regina Meier et al., Exceptions of Annie Pitti,
Defendant-Respondent.
No. 50,290.

Appeal from the Circuit Court of St. Louis County
Hon. Douglas L. C. Jones, Judge.

On January 16, 1961, the State Highway Commission filed condemnation proceedings in the Circuit Court of St. Louis County, Missouri, for the purpose of acquiring a right of way for the construction of a four-lane highway. One of the defendants was the respondent Annie Pitti. She owned property known as the Colonial Motel and a building called Club '99. The motel consisted of five one-story motel units and a story and three quarter structure, the latter of which had living quarters and an office on the first floor and motel rooms on the second floor. The Club 99 building contained a barroom and a restaurant on the first floor and living quarters on the second floor. The property was located on the west side of Highway 67, about four fifths of a mile north of Interstate Highway 270 or U. S. By-Pass 40 and 66 in St. Louis County, Missouri.

The Pitti property was about 293 feet in length adjacent to Highway 67 with an average depth of 150 feet. The property condemned was 30 feet deep along the entire frontage of the Pitti land and the Club 99 building was totally destroyed. The plan of the Highway Commission was and is to construct a four-lane limited-access highway with a service roadway on each side thereof. Before the condemnation, there were two driveways from the Pitti property to Highway 67 so that persons leaving the property could proceed either north or south. Patrons of the motel and of Club 99 could enter the property directly from the highway by way of the two driveways. After the four-lane highway is completed, no direct access will be available but the main highway may be reached by way of a service road. Entrance from the service road to the four-lane highway may be had at some distance north and south of the Pitti property. Persons wishing to enter the Pitti property must do so by leaving the four-lane highway either north or south of the property, then entering the Pitti property by way of the service road.

Commissioners appointed by the court considered the situation as above outlined and assessed damages in favor of Mrs. Pitti in the sum of $43,700. Both the Highway Commission and Mrs. Pitti filed exceptions to the report of the Commissioners. A trial before a jury resulted in a verdict for Mrs. Pitti in the sum of $57,500. The trial court overruled a motion for new trial filed by condemnor and an appeal was taken to this court.

The evidence offered by the Highway Commission as to the amount of damages was that it should not be in excess of $30,600. Hence, the amount in dispute is in excess of $15,000 vesting appellate jurisdiction in this court.

We reluctantly call attention to the wording of the notice of appeal in this case. Were it not for the im-

portance of the rule of law involved in this case, the appeal would be dismissed. Note what is said in the notice of appeal:

> "Notice is hereby given that Plaintiff, State of Missouri ex rel., State Highway Commission of Missouri, above named, hereby appeals to the Supreme Court of the State of Missouri, **from Plaintiff's Motion for New Trial** which was overruled by the trial court in this action on the 27th day of June, 1963." (Emphasis supplied.)

Appeals are permitted from final judgments or orders. The notice of appeal must "designate the judgment or order appealed from." Sup. Ct. Rule 82.08, V. A. M. R.; and see also Sup. Ct. Rule 82.04, V. A. M. R. The notice of appeal in this case is wholly insufficient. No judgment or order of the court is mentioned in the notice of appeal. Plaintiff, by the notice of appeal, stated that an appeal was taken from "Plaintiff's Motion for New Trial." No such appeal is authorized and it serves no purpose. Respondent filed no motion to dismiss but briefed the case on its merits.

The main point of law in dispute in this case is whether the property owner, Pitti, is entitled to damages based on the fact that direct access to Highway 67 has been taken away, thereby decreasing the market value of the property. The witnesses for Mrs. Pitti took that fact into consideration in determining the amount of damages she had sustained. The Highway Commission claimed that no damages should be allowed because access to the main highway is available by way of a service road. Instruction A, covering this question, was offered by plaintiff and refused by the trial court. The refusal to give this instruction was assigned as error. The instruction reads:

> "The Court instructs the jury that access and the right of ingress and egress is a property right which

may not be either totally destroyed or practically destroyed without compensating the owner; however, you are further instructed that defendant does not have the right of access and of ingress and egress from any point it may desire or at special points selected by it; and you are further instructed that you shall not award to defendant any damages nor allow to it any sum of money because of the fact that defendant will not have access between its property and the thruways of said highways, if you find that defendant has suitable access between its property and an outer or access roadway of the highway after construction of the highway or if you find that defendant has not been cut off altogether from said thruways or the general system of streets or highways even though its access to such thruways or general system of streets or highways may be inconvenient or circuitous."

We are of the opinion that the trial court properly refused to give the instruction in question. First of all, let us consider the fundamental law of this state governing this subject. Sec. 26 of Article I of our 1945 Missouri Constitution says in part, "That private property shall not be taken or damaged for public use without just compensation." We may take for granted that the so-called limited-access highways are constructed for public use. Their purpose is to make for greater safety and convenience for the travelers on the highways. In this case, Mrs. Pitti has by condemnation proceeding given up 30 feet of her property, a building, and the right of access to Highway 67. True, she has been given the right of access to a service road by which she can reach Highway 67. However, her direct access to the main traveled roadway has been destroyed. It was the opinion of expert witnesses testifying as to property values that the loss of

the direct access had materially affected the value of her property.

When this case was briefed, no appellate court in this state had considered the exact point of law and set of circumstances presented in this case. However, before this case was argued, the St. Louis Court of Appeals had decided an almost identical case. See State ex rel. State Highway Commission v. Brockfeld et al., 378 S. W. (2d) 254. In that opinion, written by the Honorable Frank W. Hayes, Special Judge, that court considered the questions of law at great length. Cases from this state as well as many from other jurisdictions were reviewed. In the concluding portion of the opinion, 378 S. W. (2d) 264 (6-8), the court there said, "The measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the difference between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof. The damage awarded abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in value of the remaining property before and after access thereto has been destroyed or impaired." It was definitely decided in that case that the right of direct access to a public roadway was a property right. A similar question was before the Supreme Court of Minnesota in the case of Hendrickson v. State of Minnesota, 127 N. W. (2d) 165, decided March 24, 1964. In the opinion, that court cited and considered many cases by the courts of other states. The Minnesota court held in that case that the right of access to a public highway by an adjoining property owner was a property right, the taking or impairment of which would entitle the property owner to damages. The court said, 127 N. W. (2d) 172, 173 (9, 10), "What is reasonable ingress and egress is a fact question. If the jury decides

that the location of the proposed interchange substantially impairs plaintiffs' right to reasonably convenient and suitable access to the main thoroughfare, plaintiffs are entitled to damages." The court concluded by saying, "Finally, the jury will, of course, consider the distance to the nearest permanent interchange or crossover which permits access in at least one direction, and the extent to which the service road may mitigate the damages."

We see no useful purpose in reviewing this question at length. We are satisfied that the opinion of the St. Louis Court of Appeals in State ex rel. State Highway Commission v. Brockfeld et al., supra, covers the subject matter fully.

In the second point briefed by the Highway Commission, it is claimed that the trial court erred in not striking certain evidence concerning damages based on loss of access and speculative future losses of business, "thereby permitting the jury to return a verdict based on damages for items for which Defendants were not entitled to compensation in excess of that permitted by and contrary to the law."

Witnesses testifying as to the damages Mrs. Pitti sustained by the decrease in value of the property stated that the inconvenience caused by the taking away of the direct access affected adversely the value of the remaining property. Such evidence was proper. See State ex rel. State Highway Commission v. Clevenger, 291 S. W. (2d) 57, l. c. 63, 64 (5).

There is no merit in the contention that the jury was permitted to allow Mrs. Pitti any amount for speculative future losses of business. The jury was specifically instructed not to allow any sum for such items. Note instruction 4 which reads as follows:

"The Court instructs the jury that in determining the just compensation or damages to which defendant may be entitled you will not consider contingent, remote, imaginary, speculative, conjectural or merely possible damages such as those based on the speed and amount of future traffic or those based on loss of future or potential customers."

We are of the opinion that the case was properly tried and that the verdict of the jury was amply supported by substantial evidence. It follows that the judgment of the trial court should be and is hereby affirmed.

Henry J. Westhues,
Special Commissioner.

Per Curiam: The Foregoing Opinion by Westhues, Special Commissioner, Is Adopted as the Opinion of the Court.

All of the Judges concur, except Dalton, J., who dissents.

In the Supreme Court of Missouri
Division Number One
September Session, 1964.

State of Missouri Ex Rel. State Highway Commission of Missouri,
Plaintiff-Appellant,
vs.
Regina Meier et al., Exceptions of Annie Pitti,
Defendant-Respondent.
No. 50 290.

Dissenting Opinion.

It is with regret that I find it absolutely necessary to dissent in this case, since I believe that the opinion adopted in the case represents a **complete change** from the sound legal principles long accepted by this Court. To explain my views a dissenting opinion is necessary.

Respondent accepted the statement of facts as set forth in appellant's brief, hence we take the facts from that statement. Respondent owned 1.0718 acres of land fronting 293 feet more or less on the west side of Highway 67 by an average depth of 150 feet on which she operated a motel. By condemnation appellant acquired for highway right-of-way purposes a tract of land approximately 30 feet wide along the entire frontage of this property, containing .222 acres, and also a temporary construction easement containing approximately .097 acres. After the condemnation, the right-of-way for the highway was 300 feet wide in front of respondent's property. The right-of-way has been improved with two "limited access" 2-lane throughways in the center portion of the right-of-way and two paved outer roadways on the outer edges of the right-of-way. Each of the outer roads are dual.

lane trafficways so that traffic may move in either direction to designated entrances into the throughways. Prior to the improvement respondent had two driveways from her property on to Highway 67, which was then a 2-lane highway, and travelers could enter her property therefrom and on leaving respondent's property they could proceed in either direction. Appellant, however, did not condemn nor take from respondent the right of ingress or egress from her remaining property to the 2-lane highway constructed upon the portion of the 300-foot highway right-of-way adjacent to her property and respondent, her customers and invitees may enter upon that 2-lane outer roadway from any point along the entire frontage of respondent's remaining property and she or they may proceed in either direction north or south as before the condemnation took place and they may enter the throughways at the designated places. Travelers may come to her property over the same routes. There is no limitation of access insofar as respondent's remaining property is concerned, but respondent and her invitees will **not** be able to enter upon the "limited access" 2-lane throughways in the center of the 300-foot highway unless they go, **as all other members of the traveling public must go,** to the proper entrances which are available some distance north and south of respondent's motel.

Briefly, my view of the law of this State applicable to the admitted facts is as follows:

An abutting owner's property right to "access" is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further right to connect with or reach the system of public highways, which right is also subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon

any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State. Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are "damnum absque injuria", or damage without legal injury. The trial court, therefore, erred in admitting evidence of depreciation of the value of respondent's property by reason of the diversion of traffic and the so called "loss of access", and erred in refusing to give plaintiff's Instruction A which, in its essential terms, fully conforms to the law of this State. Further, we are unable to discover in what manner State ex rel. State Highway Commission v. Clevenger, Mo. Sup., 291 S. W. 2d 57, supports the majority opinion in any respect.

While the petition in this case and the plans for the improvement may show that no abutting property owners shall have the right of direct access to the throughways, except as shown on the plans, this prohibition applies with equal force to all members of the general traveling public and the statement is a declaration under the police power of the State as granted to the State Highway Commission by the Constitution of Missouri 1945, Art. IV, Sec. 29. Damages caused thereby are damages without legal injury and are not recoverable. Therefore, as far as respondent and her property rights are concerned she has the same right

of ingress and egress from her remaining property to the highway right-of-way that existed before, but after she or her invitees enter upon the adjacent right-of-way of the highway, they are subject to the same regulations, inconveniences and controls that govern all other members of the traveling public. They must go to the established entrances to get on the throughways. The "limited access" in this case is, therefore, only the limitation of access as applied to the throughways. That limitation is imposed by the State Highway Commission under the police power of the State and that regulation applies to respondent and her invitees just like it does to everyone else using the highway. If it causes damage and inconvenience, it is a common inconvenience applicable to all.

Respondent, as an abutting property owner on a public highway, does not now have and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or small, on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor has she had a property right to have the same amount of traffic pass her property as before or to have it move in the same direction. Respondent's property right of access has never extended further than the right to enter upon the highway or to leave it and have reasonable connection to the public road system. Once upon the highway, the police power of the State controlled and respondent and her invitees were subject to the "Rules of the Road" as established by statute under the police power of the State (Ch. 304, Traffic Regulations, R. S. Mo. 1959) and now, as may be determined by the State Highway Commission under Constitutional authority. No one has a right to drive on any part of the road he may want to or the way he wants to. These Rules of the Road and all such police

power regulations apply to respondent and her invitees in common with all other members of the public and she may not collect damages for common inconveniences that she may suffer along with all other members of the public, nor for damages resulting from the exercise of the police power of the State.

While this Court may not have previously ruled a case exactly like this one, nevertheless, we think the general issues have been settled by many appellate court decisions, the most recent of which we find to be Filger v. State Highway Commission, decided by the Kansas City Court of Appeals, February 5, 1962, and reported in 355 S. W. 2d 425. This opinion is in conformity to the law of this State as previously declared, and it further represents sound public policy, as previously recognized. In that case the owners of a tract of land abutting upon the highway had sued for damages allegedly suffered through alterations of the traffic pattern on the existing highway. The Court of Appeals, in an opinion by Maughmer, C., held that a dimunition from 163 feet to 47½ feet in the direct access of the abutting property to the main highway did not materially block or render physically impossible vehicular entrances and did not entitle the owner to an award of damages against the State Highway Commission, and it further held that traffic, great or small, is merely an incident to streets and highways and cannot be considered an element of damages or benefits. The opinion, while not citing many Missouri cases, cites numerous cases from other states which conform to the general law of Missouri and are not inconsistent with the law as previously declared by this Court.

A late decision by the Supreme Court of Arkansas in Arkansas State Highway Commission v. Bingham, 231 Ark. 934, 333 S. W. 2d 728, is also in accord with such decisions of this Court as are available in Missouri at this time. The decision accords with sound public policy and

many decisions support the conclusion there reached, to wit, that, although the right of ingress and egress is a property right which is compensable in a condemnation action, yet, where the condemnee's remaining land was on an access road, there was no taking of such property right, even though the adjacent access road's nearest connection with the "limited access highway" was more than a mile from condemnee's filling station. It was further held that depreciation in property values and loss occasioned by the diversion of traffic and inconvenience resulting from circuitry of travel in reaching the subject property were not compensable; and that evidence of loss resulting from such diversion of traffic, et cetera, was incompetent and inadmissible. One Judge dissented, but we think his views do not accord with prior decisions of this State.

In numerous condemnation cases it has been well established that a condemnee may not recover for such injuries, damages and inconveniences as are common to other members of the public, including other landowners in the neighborhood, portions of whose land has not been taken. Chicago, Great Western R. Co. v. Kemper, 256 Mo. 279, 166 S. W. 291, 295 [8, 9].

In the case of State ex rel. State Highway Commission v. McMurtrey, Mo. Sup., 300 S. W. 2d 521, 527 [6, 7], this Court reversed the case because the trial court had refused to give Instruction No. 3, as follows: " 'The Court instructs you that in determining whether there is any damage to the defendant's (sic) land, you shall not take into consideration such inconveniences and disadvantages, if any, to the defendant as are the consequences of the lawful and proper use of the state highway in question in so far as the same are common to other landowners in the neighborhood, no portion of whose lands is taken for said state highway. Nor shall you consider any inconveniences, disadvantages, or damages which do not cause

a decrease in the market value of the defendant's (sic) land.' "

Also see Missouri, A. & G. R. Co. v. Harris, Mo. Sup., 181 S. W. 34, 35 [3] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Watkins, Mo. App., 51 S. W. 2d 543, 544 [1, 3] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Graham, Mo. App., 74 S. W. 2d 493, 494 [2] (where the refusal of such an instruction was held error); State ex rel. State Highway Commission v. Manzer, 229 Mo. App. 287, 77 S. W. 2d 123 [1]; Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480, 485; State ex rel. State Highway Commission v. Hoffman, Mo. App., 132 S. W. 2d 27, 30 [3].

A condemnee may only recover for such items of damages as are special to him.

Further, many cases deal with the rights of an abutting owner upon a public street or highway and point out that such right constitutes a property right and is an interest in land which cannot be taken by condemnation without payment therefor. Nevertheless, the cases point out that this right is subject to certain well-recognized limitations and exclusions. One of these limitations is that the right of ingress and egress does not extend to every foot of the condemnee's frontage, but under the police power of the State the right may be limited to a reasonable access under the existing facts and circumstances. Filger v. State Highway Commission, supra. Every citizen holds his property subject to the valid exercise of the police power. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 13 S. W. 2d 628, 634 [1], and cases cited.

In the case of Christy v. Chicago, B. & Q. R. Co., 240 Mo. App. 632, 212 S. W. 2d 476, 479 [4, 5], the Court

said that, "* * * when access to property is cut off in one direction by the vacation or closing of a street upon which it abuts but may be had in the other direction, the property is not taken or damaged. It does not suffer damage different in kind from that suffered by the general public although injury to the property may be greater."

Other cases hold that an abutting property owner's right of ingress and egress to and from a public street is subject to the city's right to regulate the right in the public interest and that a city may do so as long as such regulations do not unreasonably impair the owner's right. City of Clayton v. Nemours, 353 Mo. 61, 182 S. W. 2d 57, 60 [4-6]; Nemours v. City of Clayton, 237 Mo. App. 497, 175 S. W. 2d 60, 65 [1, 2]; Wilhoit v. City of Springfield, 237 Mo. App. 775, 171 S. W. 2d 95, 98 [4-6].

In the case of Press v. Penny, 242 Mo. 98, 145 S. W. 458, 459 [1, 2], the Court said with reference to the property right of access: "It is true that the exercise of this right is, like the exercise of the right of the public to travel on the same highways, subject to the reasonable control of the Legislature, applied either directly or through its municipal agencies; but each of these rights is subject to those modifications and restrictions necessary to the exercise of the other."

In the case of Gorman v. Chicago, B. & Q. R. Co. & City of St. Louis, 255 Mo. 483, 491, 164 S. W. 509, where the city had authorized the railroad to construct an embankment 15 feet high across a street requiring the re-routing of traffic and an abutting owner of property on the street complained, this Court said: "The right protected by the Constitution because it pertains to his property is the right of access to the street or free passage between his property and the street, so that he may go upon it **to exercise his public right of travel,** and when he has done so return

to his own grounds. * * * **While some courts in other jurisdictions have held that the private right of access to the street appurtenant to abutting property includes the right to travel along the street to certain other places within limits that thus far have not been satisfactorily designated,** this court has consistently adhered to the doctrine that the right of access is **the only right appurtenant to private property which is not included within such broad control as has been conferred upon the City of St. Louis** by the charter provision we have quoted." (Emphasis ours.)

In the same case the Court further stated (255 Mo. 483, 494): " 'The inconvenience to every person traveling in a vehicle south of the railroad tracks, who desires to go north directly across them on this public street, and to every person north who desires to go directly on it south across them, of having to make a **detour** by some adjacent street where crossings are provided, is the injury of which the plaintiff complains in each case. **This is a common public injury for which damages cannot be recovered by an individual citizen, although such inconvenience to the public and to him may depreciate the value of his property.**' " (Emphasis ours.) And see Siemers v. St. Louis Elec. Terminal R. Co., 348 Mo. 682, 155 S. W. 2d 130, 136 [9-11].

In the case of Christy v. Chicago, B. & Q. R. Co. supra, 212 S. W. 2d 476, 479 [4, 5], the Court further said "It is now a well settled doctrine in this state that property is not damaged by the vacation or closing of a street or highway unless it abuts upon that part of the street vacated, **or, is cut off altogether from the general system of streets or highways. This is not a universal doctrine and it has been criticized but it is the law in this state established by a long line of authorities,** which authorities also establish the further proposition that when access to property is cut off in one direction by the vacation or

closing of a street upon which it abuts but may be had in the other direction, the property is not taken or damaged. It does not suffer damage different in kind from that suffered by the general public although injury to the property may be greater." (Emphasis ours.)

It will be noted that both the Christy case and Gorman case call attention to the fact that the law of Missouri is not universally accepted in this country; some states do not follow the Missouri law. We call this to the Court's attention because the majority opinion cites the case of State ex rel. State Highway Commission v. Brockfeld, Mo. App., 378 S. W. 2d 254, and purports to follow it, but we think the foreign cases cited in that opinion definitely conflict with established Missouri law. The opinion in Hill-Behan Lumber Co. v. State Highway Commission, 347 Mo. 671, 148 S. W. 2d 499, 502, points out that some contrary decisions in other states are based upon statutes or constitutional provisions that are not controlling in Missouri.

A party may recover only when his private property rights are take , **but not for rights he enjoys as a member of the public.** In Rude v. The City of St. Louis, 93 Mo. 408, 414, 6 S. W. 257, the Court said: "In Dillon on Municipal Corporations, we find this statement: 'Although the distinction between the nature of the rights of the public in a street, and the right of an individual proprietor **to access to his premises** from the street, has been often overlooked, yet it is one which has been asserted by high authority. The right of an abutting owner to access to and from the street is a **private right**, in the sense that it is something different from the right which the members of the public have to use the street for public purposes. Conformably to this distinction, and in part based upon it, a person owning or in possession of premises abutting on the public highway or street, **whose right of access to the same is unreasonably or unlawfully ob-**

structed, may recover from the person causing such obstruction damages for the private injury he sustains, where such damages are particular, direct, and substantial.' Sec. 730 [3 Ed.]. So the law is quite well settled that the property owner must show, to entitle him to recover damages for an obstruction to a highway, that the damages are peculiar to him, different in kind, and not merely in degree, from those suffered by other members of the community."

In Fairchild v. City of St. Louis, 97 Mo. 85, 87, 11 S. W. 60, the Court said: "The ground of complaint is the same in each case, and in each case access to the public street to and from the owner's property and along it to the whole public street system of the city is unobstructed, though not so convenient perhaps as before this crossing was closed. The inconvenience to every person traveling in a vehicle south of the railroad tracks, who desires to go north directly across them on this public street, and to every person north who desires to go directly on it south across them, of having to make a **detour** by some adjacent street where crossings are provided, is the injury of which the plaintiff complains in each case. This is a common public injury for which damages cannot be recovered by an individual citizen, although such inconvenience to the public and to him may depreciate the value of his property."

In Wilson v. Kansas City, Mo. Sup., 162 S. W. 2d 802, 803 [1, 2], the Court, with reference to an abutting landowner's rights, said: " 'The right protected by the Constitution because it pertains to his property is the right of access to the street or free passage between his property and the street, **so that he may go upon it to exercise his public right of travel**, and when he has done so return to his own grounds'." (Emphasis ours.)

I think it unnecessary to cite applicable cases from other jurisdictions, since many such cases are reviewed in the

Arkansas State Highway condemnation case, supra, 333 S. W. 2d 728 and in the Filger case, supra, 335 S. W. 2d 425.

To my mind the case for decision is an unusually important case, both to the parties and to the State. If the State must pay for the so called "loss of access" when full access to a public highway is provided for the condemnee's remaining lands and after a reasonable access is provided into the throughways in the same manner that access is provided to all other members of the traveling public, then the State Highway Commission might as well limit all access at the property line and cease to build the paved access roads. And, if when an improved highway brings traffic and business to an abutting owner and increases the value of his property and on condemnation the State is going to have to pay for any diminution in value of the property, in the event that traffic is diverted, it will result in improper and an unreasonable benefit to abutting owners, for which the State will have to pay.

I think the trial court erred in refusing to give plaintiff's Instruction A, and in admitting in evidence the testimony concerning the alleged $25,000 decrease in value of the premises due to the diversion of traffic by the limited access nature of the new roadway causing traffic to flow faster by the premises, deterring northbound traffic, hindering southbound traffic and causing an obstacle or barrier interfering with the free flow of customer traffic into the condemnee's property; and that the speed at which the traffic would flow by would deter people who were potential customers from stopping.

I think the judgment should be reversed and the cause remanded for the reasons stated.

S. P. Dalton, Judge.

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IN THE

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No. 338 [redacted]

GEORGE F. MOHR and GENEVIEVE B. MOHR,
Petitioners,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Supreme Court of Missouri.

ROBERT L. HYDER
BRUCE A. RING
State Highway Building
Jefferson City, Missouri
Attorneys for Respondent.

KELLY PRESS, INC., 201 South Eighth Street, Columbia, Missouri Gibson 3-4163

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1964.

No. 338 Original.

GEORGE F. MOHR and GENEVIEVE B. MOHR,
Petitioners,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

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STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Missouri.

QUESTION PRESENTED.

We feel that clarification of the question presented should be made to correspond with the facts presented to the Supreme Court of Missouri. We respectfully submit that the question presented is as follows.

When real estate abutting upon a highway, which consists of two surfaced roadways, has the right of access to one of the surfaced roadways and the highway is reconstructed so as to provide four surfaced roadways and the real estate retains unlimited right of access to the nearest adjacent surfaced roadway, has a compensable property right (right of access) been taken from the owner of the real estate?

STATEMENT OF CASE.

Respondent has not been served with the printed record, therefore this statement is based upon the facts set out in the opinions attached to the petition of Petitioners.

A. MOHR CASE

The following statement is applicable to the case of Petitioners Mohr as taken from the decision of the Missouri Supreme Court attached to Petitioners' Petition as Appendix A (pages 14 and 15 of Petition).

This was a condemnation proceeding brought by the State of Missouri at the relation of the State Highway Commission of Missouri to acquire right-of-way for the construction and maintenance of Interstate 70 in Warren County, Missouri. Commissioners appointed by the trial court pursuant to said proceeding awarded to Petitioners the sum of $15,000 and both Petitioners and Respondent appealed to a jury trial, which resulted in a verdict and judgment in favor of Respondent in the amount of $7,000.

Prior to the institution of the condemnation proceeding Petitioners owned a tract of land located on the south side of existing Route 40 in Warren County, Missouri. There was no restriction of access between Petitioners' property and the existing highway and Petitioners' property was afforded access to one surfaced roadway of the highway by means of two entrances. Route 40, as it existed at the time

of the institution of the condemnation proceedings, was what is commonly called a dual lane highway, having two concrete roadways or pavements. One pavement was 18 feet in width and carried two lanes of traffic in a westwardly direction, and the other pavement was 24 feet in width and carried two lanes of traffic in an eastwardly direction. These roadways were separated by an earthen median.

By the condemnation proceedings a small triangular tract there was no dispute between the parties as to the Petitioner's property at its northeast corner. The condemnation petition provided that no abutting property owner should have any right of direct access to the highway or its right-of-way "except that access will be permitted to any adjacent outer roadway to which access is not specifically prohibited by the special symbol denoting no right of access as shown on said plans". There was **no restriction of access between Petitioners' remaining property and the nearest adjacent surfaced roadway of the newly constructed highway** designated as the south outer roadway.

The reconstruction of the highway involves the construction of four surfaced roadways, all contained within one continuous right-of-way and all roadways being generally parallel with one another. The northernmost roadway is designated as an outer roadway and is designed to carry traffic in both directions. The next roadway to the south is designated as the westbound throughway and is designed to carry two lanes of traffic westwardly. The next roadway to the south is designated as a throughway and is designed to carry two lanes of traffic eastwardly. The southernmost roadway is designated as an outer roadway and is designed to carry one lane of traffic in each direction. All of the roadways will be separated from one another by means of an earthen median strip and there is no provision for traffic

on any roadway to enter onto another roadway of the highway except at designated interchanges. One interchange is located west of the Petitioners' property at the City of Warrenton and at this point traffic on any roadway can, by means of the enterchange, enter onto any other roadway. Another interchange will be located east of Petitioners' property at the City of Wright City and at that point traffic on any roadway of the highway can, by using said interchange, enter onto any other roadway of the highway.

In the trial court and in the appellate courts there was no dispute between the parties as to the Petitioners' right to compensation for the taking of the property of Petitioners and any damage to the remainder of Petitioners' property resulting from the taking. The dispute between the parties was whether or not, under the facts above set out as they were developed in evidence in the trial, Respondent had taken from Petitioners a compensable property right of access between their property and the highway.

B. PITTI CASE

The following facts as set out by the Supreme Court of Missouri in its decision are applicable to the Pitti case.

This was a condemnation proceeding instituted by the State of Missouri at the relation of the State Highway Commission of Missouri to obtain right-of-way for the reconstruction of Route 67 in St. Louis County. Prior to the appropriation of the right-of-way Petitioner Pitti owned slightly more than one acre of land fronting on the west side of existing Highway 67, upon which Petitioner operated a motel. By the condemnation proceeding Respondent acquired right-of-way approximately 30 feet in width across the frontage of the Pitti property, along with a construction easement. Route 67 prior to reconstruction consisted of a two lane single roadway highway, to which Petitioner

had access. Upon reconstruction of the highway, the existing highway was replaced with four separate roadways which were separated from one another by means of an earthen median. The reconstructed highway consists of two two-lane throughways in the center, one throughway carrying two lanes of traffic in one direction and the other throughway carrying two lanes of traffic in the opposite direction. On each side of the throughway pavements are surfaced roadways designated as outer roadways, each of which will carry traffic in both directions.

Petitioner's property abuts upon and has unlimited access to the western outer roadway. Both outer roadways connect to the throughway pavements at designated points. (Pages 51 and 52, Petition of Petitioners).

In the trial court and in the Supreme Court of Missouri there was no dispute between the parties as to the Petitioner's right to compensation for the taking of the property of Petitioner and any damage to remainder of Petitioner's property resulting from the taking. The dispute between the parties was whether or not, under the facts above set out as developed in evidence at the trial, Respondent had taken from Petitioner a compensable property right of access between her property and the highway.

ARGUMENT.

At the outset of this argument Respondent wishes to point out that it has no quarrel with the proposition that an abutting property owner's right of access to a public highway is a property right which, **if taken from him**, entitles him to compensation. Respondent did not take a position contrary to this at any stage of the proceedings in either of these cases. The Supreme Court of Missouri did not hold contrary to this proposition in either of these cases. In both cases the Supreme Court of Missouri recognized that the right of access which an abutting property owner has to and from the adjacent public highway is a property right and the Court further recognized that if that right of access were taken the owner would be entitled to compensation for its loss. The position which Respondent has taken throughout all proceedings in both of these cases is that, under the fact situations presented in both cases as developed in evidence, the property owners retained their right of access to the highway, did not lose any property right of access between their properties and the adjacent highway and therefore were not entitled to compensation for this particular element. That is the question ruled upon by the Supreme Court of Missouri in both of these cases. The premise upon which the Supreme Court decided these cases is quite clear in the opinions handed down by that Court. The Court stated in the **Mohr** case, "Of course, a complete blocking of an abutter's access takes from him a property right in the nature of an easement and this requires resort to eminent domain. However, ingress and egress to a particular lane of a highway and direction of travel thereon can be regulated under the police power of the State for public safety and general welfare, without compensation to an abutter who is furnished unrestricted right of access to a lane of the highway upon which his property abuts and

which connects with the restricted lanes at designated points. * * * In this case, Respondents have been furnished unrestricted access to a lane of the highway, an outer road on its right-of-way, along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway." (Pages 17-18, Petition of Petitioners)

In the **Pitti** case, the Supreme Court of Missouri stated, "An abutting owner's property right of 'access' is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further right to connect with or reach the system of public highways, which right is also subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State. Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic, the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury. The trial court, therefore, erred in admitting evi-

dence of depreciation of the value of Respondent's property by reason of the diversion of traffic and the so called "loss of access'." (Pages 52-53, Petition of Petitioners). The Court in that case continued by stating, "Therefore, as far as Respondent and her property rights are concerned, she has the same right of ingress and egress from her remaining property to a highway right-of-way that existed before, but after she or her invitees enter upon the adjacent right-of-way of the highway they are subject to the same regulations, inconveniences and controls that govern all other members of the traveling public" (Pages 53-54 Petition of Petitioners).

Thus, from the above excerpts from the decisions of the Missouri Supreme Court in these two cases, it is obvious that Missouri adheres to the general rule that the right of access between adjacent property and a public highway is a property right which cannot be taken without compensation but the Court further recognized that what the Petitioners in this case were complaining of was not the fact that they would not be permitted to proceed from their property onto the adjacent public highway and thereupon exercise their public right of travel but were complaining that their properties would be decreased in value because the main stream of traffic would no longer be immediately adjacent to their properties so as to permit their commercializing upon this traffic. The facts in both of the cases were undisputed that there is no restriction on the Petitioners' rights to proceed from their property directly onto the nearest traveled roadway and vice versa. Also, there is no question but that once upon that roadway the Petitioners can exercise their public right of travel, subject to such police regulations as the State deems necessary to impose for public protection and welfare.

The rule expressed by the Supreme Court of Missouri

in these cases is not peculiar to the State of Missouri. The same rule has been expressed and applied by the appellate courts of other states.

Arkansas State Highway Commission v. Bingham, 231 Ark. 934, 333 S.W.2d 728;

Pennysavers Oil Co. v. State of Texas, 334 S.W.2d 546;

State of Texas v. Baker Bros. Nursery, 336 S.W.2d 212;

Nettleton Co. v. State of New York, 202 N.Y. Supp.2d 102;

Muse v. Mississippi State Highway Commission, 233 Miss. 694, 103 S.2d 839;

State v. Fox, 333 P.2d 943 (Wash.);

Moses v. North Carolina State Highway Commission, 261 N.C. 316, 134 S.W.2d 664.

This Court has recently ruled on a petition for Writ of Certiorari in a case almost identical in facts to the cases presented by the Petitioners herein. In the case of **Joseph E. Moses, et ux. v. North Carolina State Highway Commission, No. 490**, October Term 1964, this Court, on December 7, 1964, denied the property owner's petition for Writ of Certiorari applied for on the same question as involved in the instant case. **Moses v. North Carolina State Highway Commission**, 13 L. Ed.2d, 342.

This Court also denied a Writ of Certiorari in a case decided by the Missouri Supreme Court concerning a slightly different factual situation than here involved but involving the same legal principle. **Hill-Behan Lumber Co. v. State Highway Commission of Missouri**, 314 U.S. 636. The decision of the Supreme Court of Missouri in the **Hill-Behan Lumber Co.** case is reported in 347 Mo. 671, 148 S.W.2d 499. In that case the property owner originally had access to the throughway pavement of Page Avenue in St.

Louis County, Missouri. The State Highway Commission of Missouri constructed an overpass to carry the throughway pavement of Page Avenue over a railroad track. The pavement to which the property owner had originally had access was removed and in its stead a new elevated pavement was constructed to carry through traffic. The physical feature of this reconstruction was such that the property owner could no longer have direct access from its property onto the main throughway pavement. Instead, the reconstruction provided a ramp alongside the main pavement constructed within the limits of the original right-of-way of the public way but outside of the area which had formerly been occupied by the throughway pavement, to which ramp the property owner had access. The property owner brought proceedings to collect compensation for loss of access to the existing public way. The Supreme Court of Missouri ruled that the property owner had not lost any right of access for which it was entitled to compensation and this Court denied a Writ of Certiorari on petition of the property owner.

The highway involved in the **Mohr** case is a part of the national system of interstate and defense highways designated and constructed pursuant to an act of Congress of the United States contained in **23 U.S.C.A.**, Sec. 103. That the loss, if any, of which the Petitioners in the instant case complain is not a property right is fully demonstrated by the regulations of the Bureau of Public Roads of the United States Department of Commerce, promulgated pursuant to the Federal Aid Highway Act. Paragraph 6(k) of **Policy and Procedure Memorandum 21-4.1** issued by the Bureau of Public Roads of the United States Department of Commerce, December 30, 1961, as amended October 7, 1963, by Policy and Procedure Memorandum 21-4.1(3) provides:

"k. Payments made for personal property, loss of busi-

ness or good will, **circuity of travel and diversion of traffic,** or any items of damage not generally compensable in eminent domain are not considered eligible for federal participation; nor will said funds participate in payments made for loss or impairment of access so long as the landowner retains or is furnished reasonable access to an existing public highway **to a frontage road,** or to any other part of the public highway system. Reasonable access shall be determined in all cases without regard to circuity of travel or diversion of traffic within the public highway system." (Emphasis ours).

From this provision it would appear that the generally accepted principle of law is that if a property owner is allowed access to one traveled roadway of a dual- or multi-roadway facility, he is not entitled to compensation for loss of access merely because he does not have access to each and every traveled roadway of the highway facility.

CONCLUSION.

From the foregoing statement of the case and the discussion of the priciples upon which the Petitioners' cases were decided by the Supreme Court of the State of Missouri, it is shown that Petitioners did not have taken from them a property right of access to the public highways for which they are entitled to compensation, but instead their claim for damages is based upon a diversion of traffic rather than a loss of the property right of access. Respondent therefore respectfully submits that the petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

ROBERT L. HYDER
BRUCE A. RING
State Highway Building
Jefferson City, Missouri
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 338

GEORGE P. MOHR and GENEVIEVE B. MOHR,
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STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

PETITIONERS' REPLY BRIEF.

HYMAN G. STEIN,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Attorney for Petitioners.
WALTER WEHRLE,
101 South Meramec,
Clayton, Missouri,
Of Counsel for Petitioners.
JOHN MONTREY,
REXFORD H. CARUTHERS,
818 Olive Street,
St. Louis, Missouri,
Of Counsel for Petitioners.
RICHARD MARX,
900 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

PETITIONERS' REPLY BRIEF.

Respondent, in its Brief herein, cites the denial by this Court of a Writ of Certiorari in **Moses et ux. v. North Carolina State Highway Commission**, 379 U. S. 930, 13 L. Ed. 2d 342, and in **Hill-Behan Lumber Co. v. State Highway Commission of Missouri**, 314 U. S. 636.

In a memorandum opinion in **Agoston v. Pennsylvania**, 340 U. S. 844, Mr. Justice Frankfurter said:

> "The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.' (citing cases). A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court. * * *
>
> * * * * * * * *
>
> "* * * The denial of the petition seeking to bring here the decision of the Supreme Court of Pennsylvania carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it. * * *"

Moreover, **Moses** and **Hill-Behan** each involved a situation quite unlike that in this case.

In **Moses** there were certain facts and circumstances on account of which the Court might well have been required to give consideration to questions relating to estoppel and the interpretation of a deed.

The opinion of the Supreme Court of North Carolina in **Moses** is printed in 261 N. C. 316, and 134 S. E. 2d 664.

Moses was an action for compensation for an easement which Moses had acquired over property which abutted a highway. Moses had acquired such easement some time subsequent to the Highway Commission's proposal to enlarge the highway in order to convert it into an Interstate Highway, and subsequent to the time of the Highway Commission's survey and marking of the boundary of the enlarged highway (134 S. E. 2d at pages 665, 668). Also, the deed conveying such easement to Moses was executed

subsequent to the enactment by North Carolina of Chapter 993, S. L. 1957 (Art. 6D, c. 136 of the General Statutes of North Carolina), providing, inter alia, for the acquisition by the Commission of property and property rights, controlled-access facilities and service roads, the denial to abutting property owners of rights of access to new highway locations, and the consideration of such denial in determining general damages (General Statutes of North Carolina, chapter 136, § 136-89.52). In its opinion, 134 S. E. 2d at 668, the Supreme Court of North Carolina said:

> "This deed (granting the mentioned easement) was executed subsequent to the enactment of Chapter 993, S. L. 1957 (Art. 6D, c. 136 of the General Statutes). In examining it we are led to the conclusion that both petitioners and their grantors understood the law to be as we have here declared. **THE EASEMENT THEN GRANTED WAS TO CONTINUE ONLY 'UNTIL SUCH TIME AS THE SAID LAND SHALL BE CONVEYED TO OR TAKEN BY THE STATE HIGHWAY AND PUBLIC WORKS COMMISSION FOR HIGHWAY PURPOSES WITH ADEQUATE ACCESS ALLOWED TO SECOND PARTIES FOR THE OPERATION OF THEIR MOTEL AND RESTAURANT BUSINESS.'** * * * What highway were the parties talking about? Certainly they were not talking about 301 as it existed at the time of conveyance. **THE RECITALS IN THE DEED SHOW THAT THEY ANTICIPATED THE ENLARGEMENT OF THE HIGHWAY IN THE IMMEDIATE FUTURE.** * * *" (Emphasis supplied.)

It will be noted that in the deed to Moses it was provided that the easement was to continue only until such time as the subservient land was conveyed to or taken by the State for highway purposes "with **ADEQUATE ACCESS**" allowed to "Moses". Thus, Moses was not en-

titled to a **DIRECT** access. Under the terms of the deed Moses was entitled only to "adequate access". Moses was provided access by way of a service road and it may well be that the North Carolina Supreme Court concluded that Moses was thereby provided with "adequate" access.

In this case, however, Petitioners were the owners of and had **direct** access to the highway, and their right of access was not limited, as in **Moses**, to merely such access as might be deemed "adequate."

Further, in its opinion in **Moses**, 134 S. E. 2d at 668, the North Carolina Supreme Court said:

> "It is further provided in the deed, 'In case said land is taken by condemnation, first parties shall be entitled to and hereby reserve for themselves, their heirs and assigns, the right to the entire award for damages resulting from such condemnation, except damages, if any, for severance from said 3.7 acres of land in case adequate access is not available to the second parties, their heirs and assigns, and in such event, the said second parties shall be entitled to severance damages for loss of adequate access to **said highway.**'"

It is quite possible that this Court may have concluded that Moses were not the real parties in interest and had conveyed away any claim they might have had for damages for deprival of **direct** access.

In Hill-Behan, the situation presented was that the State Highway Commission had changed the grade of the highway within confines of the right of way to the inconvenience of the abutting owner. The Supreme Court of Missouri concluded that the owner could not recover in said case and in its opinion, 148 S. W. 2d 499 at 502, said:

> "* * * we base that conclusion on the absence of a statute authorizing damages to abutting property

owners, if damage results, when the state or its agency changes the grade of a public highway."

In its Brief Respondent treats the "Question Presented" as involving nothing more than "the right of access." We respectfully submit that such is not the case here. The question here presented arises out of the taking of the Petitioners' **DIRECT** access to the abutting highway.

Respondent cites the regulations of the Bureau of Public Roads of the United States Department of Commerce respecting damages considered eligible for Federal participation. We respectfully submit that such regulations can have no bearing on the Constitutional rights and issues involved in this case.

Respondent's Brief states that the rule expressed by the Missouri Supreme Court in this case has been expressed and applied by the Appellate Courts of other states named on page 9 of its Brief. The questions here presented are Federal questions and obviously the decisions of the Appellate Courts in various of the states are not here controlling. However, we call attention that in the St. Louis Court of Appeals' opinion in the case of Petitioners Mohr, at pages 36 et seq. of Petitioners' Petition for Writ of Certiorari herein, there are set forth decisions by the Appellate Courts of other states holding contrary to the Missouri decisions here involved. Similarly, the decision of the Supreme Court of Minnesota in the case of **Hendrickson v. State of Minnesota**, 127 N. W. 2d 165, holds contrary to the rule expressed by the Missouri Supreme Court in this case.

In **United States v. Oregon**, 366 U. S. 643, at page 645, this Court said:

"Because of the importance of this question of federal statutory construction and **AN ALLEGED CONFLICT BETWEEN THIS DECISION AND DECI-**

SIONS PREVIOUSLY MADE BY OTHER STATE COURTS OF FINAL JURISDICTION, we granted certiorari." (Emphasis supplied.)

Respectfully submitted,

HYMAN G. STEIN,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Attorney for Petitioners.

WALTER WEHRLE,
101 South Meramec,
Clayton, Missouri,
Of Counsel for Petitioners.

JOHN MONTREY,
REXFORD H. CARUTHERS,
818 Olive Street,
St. Louis, Missouri,
Of Counsel for Petitioners.

RICHARD MARX,
900 International Building,
722 Chestnut Street,
St. Louis, Missouri,
Of Counsel for Petitioners.